

# Criminal Law Bulletin

## DIGEST INDEX

to

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# CRIMINAL LAW BULLETIN

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Vol. 5 No. 12

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Volume IV January to December, 1968

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*Editors*—NEIL FABRICANT & JOSH KOPLOVITZ

*Managing Editors*—DENISE SCULLY & VICKI ZAK

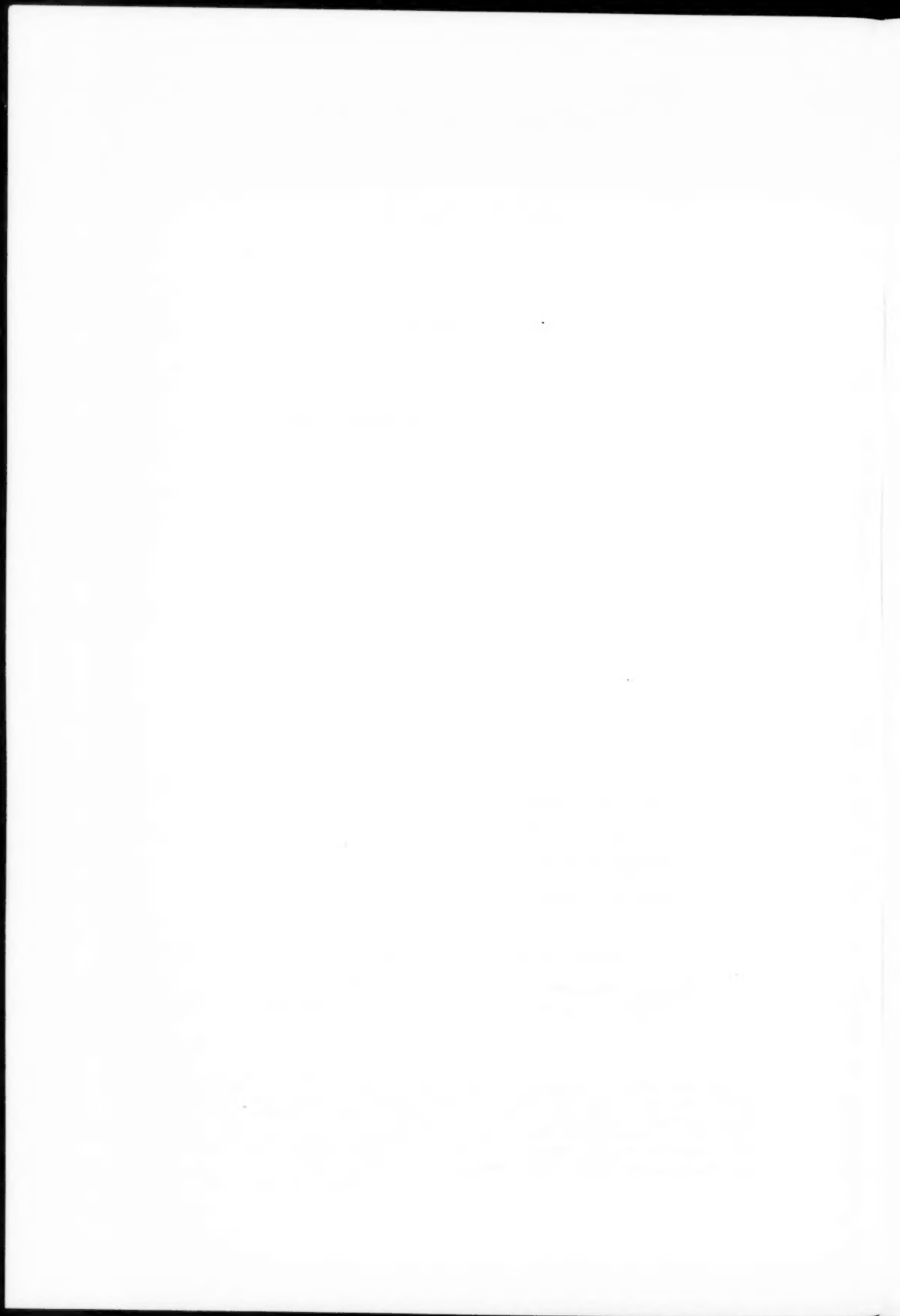
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**Court of Appeals, 4th Cir.** Where petitioner was induced to confess by prosecution's promise that he would not be prosecuted on other charges, the confession was inadmissible, notwithstanding the prosecutor's willingness to live up to his end of the bargain. *Grades v. Boles*, 398 F.2d 409, 4 CLB 488.

**Alabama** Defendant's testimony that the sheriff told him after his arrest that "it would go lighter on me if I did talk" coupled with sheriff's testimony that he *could have* made such a statement to the defendant mandates a finding that the prosecution failed to establish that the confession was not induced by a promise of lighter punishment. *Womack v. State*, 205 So.2d 579, 4 CLB 186.

**Illinois** Police officer's statement to defendant that "it would be better for him" to confess does not in itself render subsequent confession involuntary. *People v. McGuire*, 234 N.E.2d 772, 4 CLB 254.

**North Carolina** Statement of police officer that "I advised Dennis [a 14-year-old under arrest in a police station] if he knew anything about this, if he would tell me, I would in any way assist him or help him as a youngster," made after proper *Miranda* warnings had been given rendered defendant's subsequently given confession inadmissible. The statement "aroused in defendant some hope and . . . this emotion of hope induced the confession . . . [and we] do not think the confession can be considered as freely and voluntarily given. . . ." *State v. Gibson*, 162 S.E.2d 627, 4 CLB 472.

**Wisconsin** A murder confession is involuntary as a matter of law when it is given shortly after the police have taken the defendant to the morgue and forced her to view the corpse of the deceased. *McKinley v. State*, 154 N.W.2d 344, 4 CLB 130.

**§1.10. Delay in arraignment**

**Michigan** Michigan excludes from evidence any admissions made under questioning during an unnecessarily lengthy

delay in arraignment instigated by the police for the purpose of such questioning. See *People v. Hamilton*, 359 Mich. 410, 102 N.W.2d 738 (1960). *People v. Walters*, 154 N.W.2d 542, 4 CLB 128.

**Pennsylvania** Unfair manner of obtaining tacit admissions rendered them inadmissible in pre-*Miranda* trial. *Commonwealth v. Stevens*, 240 A.2d 536, 4 CLB 368.

**§1.20. Absence of counsel**

**New York** Statements elicited from suspect in New York robbery after out-of-state arrest on out-of-state vagrancy charge (which was pretext for interrogation), held inadmissible in subsequent robbery prosecution. Filing of information and arrest warrant in New York precluded further questioning in counsel's absence. *People v. Malloy*, 22 N.Y.2d 559, 4 CLB 531.

**New York** Appellant's arrest on parole warrant did not preclude police interrogation concerning robbery in absence of counsel. Issuance of parole warrant was not initiation of judicial proceedings. *People v. Simons*, 22 N.Y.2d 533, 4 CLB 533.

**New York** Defendant's right to counsel attaches in pre-*Miranda* case where police are apprised counsel is acting on defendant's behalf. *People v. Arthur*, 22 N.Y.2d 325, 4 CLB 367.

**New York** Police refusal to honor defendant's request to telephone lawyer for advice renders drunkometer test results inadmissible. *People v. Gursev*, 22 N.Y.2d 224, 4 CLB 374.

**New York** A defendant who has been arraigned in one county on a charge of receiving stolen property, who has had counsel assigned to represent him on that charge, and who is then released and immediately arrested by police officers from another county on charges of committing a burglary involving the same allegedly stolen property, may not be interrogated about the burglary without prior notice to his assigned attorney. *People v. Vella*, 21 N.Y.2d 249, 4 CLB 71.

**§1.30. Product of an illegal arrest or search**

**United States Supreme Court** Where Government failed to establish that petitioner's testimony at first trial was not induced by the introduction of illegally taken confessions, petitioner's conviction on second trial in which his testimony was introduced against him was reversed. *Harrison v. United States*, 392 U.S. 219, 4 CLB 297.

**New York** Confession elicited from suspect brought into police station for questioning without probable cause held admissible where crime involved was murder and defendant knew he was not under arrest. *People v. Morales*, 22 N.Y.2d 55, 4 CLB 251.

**Oregon** A defendant's arrest on a traffic charge, made in order to detain him while investigating his possible guilt of a burglary, does not invalidate his subsequent confession to the burglary if it can be shown that there is no causal connection between the arrest and the confession; as, for instance, if the defendant availed himself of an opportunity to talk to an attorney while thus detained. *State v. Allen*, 434 P.2d 740, 4 CLB 128.

**§1.40. Escobedo v. Illinois**

**Colorado** Certain statements elicited from a semi-literate Navajo Indian with limited understanding of the English language and introduced into evidence in a post-*Escobedo*, pre-*Miranda* trial (*Escobedo* therefore applied) were inadmissible under *Escobedo* notwithstanding the fact that the key requirement for invocation of the *Escobedo* rule — the request for and denial of counsel — did not occur. In the court's view, to refuse to apply *Escobedo* to a defendant because he failed to request counsel when "his failure is derived from the very ignorance which demands solicitude from our legal processes" would frustrate the very intent of the *Escobedo* rule. *Nez v. State*, 445 P.2d 68, 4 CLB 534.

**Oregon** After *Escobedo v. Illinois*, 378 U.S. 478 (1964), a defendant's expressed

desire to speak to an attorney does not automatically preclude the police from questioning him until that desire is satisfied. He must specifically indicate that it is his wish not to answer questions until he has seen an attorney. *State v. Earp*, 440 P.2d 214, 4 CLB 368.

**Washington** A suspect's mumbled requests for an attorney, which the interrogating officers did not hear, do not bring his subsequent admissions within the *Escobedo* exclusionary rule. *State v. Aiken*, 434 P.2d 10, 4 CLB 127.

**§1.60. Post-Indictment and Post-Arrest**

**Illinois** Post-indictment admission made in the absence of counsel is inadmissible although police were not actively seeking to elicit incriminating statements. *People v. Lagardo*, 237 N.E.2d 484, 4 CLB 472.

**§1.70. Fruit of an Earlier Inadmissible Statement**

**Pennsylvania** Written confession obtained after the defendant had orally confessed without being advised of his *Escobedo* rights was properly admitted in evidence since the defendant was properly advised prior to giving the written statement and it was not tainted by the illegality of the initial questioning. *Commonwealth v. Moody*, 239 A.2d 409, 4 CLB 252.

**§2.00. Prerequisite of custodial interrogation**

**United States Supreme Court** *Miranda v. Arizona* held applicable to tax fraud investigation. Where accused is in prison on an unrelated charge and is questioned by federal tax agent, his admissions may not be received in evidence unless he was fully advised in accordance with the rules set forth in *Miranda*. *Mathis v. United States*, 391 U.S. 1, 4 CLB 233.

**Court of Appeals, 2nd Cir.** Second Circuit rejects argument that IRS agents must give *Miranda* warning where investigation has reached accusatory stage even though interrogation is not "custodial." *United States v. Mackiewicz*, 401 F.2d 219; *United States v. Squeri*, 398 F.2d 785, 4 CLB 354.

**Maryland** *Miranda* applies to interrogation of prison inmate. *Hunt v. State*, 234 A.2d 785, 4 CLB 53.

**Nevada** When police come to a suspect's house in response to his own telephone report that "I just killed my wife," and they ask him what seems to be the trouble, his answer to this question is admissible without regard to the *Miranda* warnings. Such a question is not "interrogation" within the meaning of *Miranda*, because it does not contemplate an inculpatory response. *State v. Billings*, 436 P.2d 212, 4 CLB 184.

**New Jersey** Despite the fact that the defendant was taken to a police station by two police officers, there is no arrest or custodial interrogation where court finds from police testimony that if the defendant had asked to leave they would not have detained him. *State v. Williams*, 235 A.2d 684, 4 CLB 128.

**New York** A person questioned on a public street by a police officer who is holding a gun on him is undergoing "custodial interrogation" within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966), and he must be warned of his rights, even if the officer has pulled his gun only to protect himself. *People v. Shivers*, 21 N.Y.2d 118, 4 CLB 56.

**North Carolina** General questioning at the scene of a homicide does not constitute "custodial interrogation" within the meaning of *Miranda v. Arizona*. *State v. Meadows*, 158 S.E.2d 638, 4 CLB 184.

**Oregon** Questioning a suspect in a police car in front of his home, after which he is permitted to return home (and arrested there the next day), is not "custodial" within the meaning of *Miranda v. Arizona*. *State v. Travis*, 441 P.2d 597, 4 CLB 433.

**Washington** The mere fact that a suspect rides to the police station in a police car to undergo a polygraph test at police request does not place him in "custody" so as to require the *Miranda* warnings before interrogation may commence. The test is whether there are express or implied threats that he will be taken forcibly if

he does not come willingly. *State v. Bower*, 440 P.2d 167, 4 CLB 367.

**Wisconsin** Failure to administer the *Miranda* warnings invalidates a confession given by a defendant in police custody even if he is not undergoing interrogation at the time of the confession, so long as he has been questioned at some time after his arrest. *State v. La Fernier*, 155 N.W.2d 93, 4 CLB 128.

#### §2.10. Sufficiency of warnings

**Court of Appeals, 2nd Cir.** Failure to advise a defendant that he has the right to have counsel present when questioned does not vitiate confession where "substance of warning" is given. *United States v. Vanterpool*, 394 F.2d 697, 4 CLB 240.

**Court of Appeals, 5th Cir.** Warning to defendant that "he could talk to an attorney, that if he was unable to hire an attorney the Commissioner or the Court would appoint one for him" failed to satisfy *Miranda* requirement that an accused "has the right to the presence of an attorney (during any questioning), and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires." (384 U.S. at 478-479) *Lathers v. United States*, 396 F.2d 524, 4 CLB 416.

**Court of Appeals, 5th Cir.** Advice that an accused had "the right to consult with an attorney, anyone of his choosing, at anytime" does not comply with *Miranda's* directive "... that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have a lawyer with him during interrogation. . . ." *Atwell v. United States*, 398 F.2d 507, 4 CLB 354.

#### §2.20. Waiver

**Court of Appeals, 7th Cir.** Where defendant first indicates a desire to remain silent and then indicates that agents could continue to question him, agents should make further inquiry as to defendant's understanding before commencing interrogation. *United States v. Nielsen*, 392 F.2d 849, 4 CLB 108.

**Court of Appeals, 9th Cir.** Fact that defendant was only 16 does not create an inference (rebuttable by the prosecution) that he is incapable of waiving his privilege against self-incrimination in a custodial interview. *Lopez v. United States*, 399 F.2d 865, 4 CLB 416.

**California** A defendant's first refusal to waive his rights after *Miranda* warnings precludes all further interrogation, even if the police administer the warnings anew in light of what they believe to be changed circumstances. *People v. Fioritto*, 441 P.2d 625, 4 CLB 433.

**Minnesota** *Miranda v. Arizona* is not violated where, without notice to and in the absence of his attorney, the defendant is visited by his mother, is persuaded by her to tell the truth, and thereafter, upon being fully warned by the police, gives a full confession in response to their interrogation. *State v. Renfrew*, 159 N.W.2d 111, 4 CLB 367.

**Nebraska** After the giving of the *Miranda* warnings and the suspect's express refusal to give a statement, the police are not precluded from confronting him with incriminating evidence, administering the warnings anew, and then eliciting statements. *State v. Godfrey*, 155 N.W.2d 438, 4 CLB 186.

**North Carolina** Defendant's confession elicited in response to questioning on the second day after his arrest is admissible where he was adequately warned of his *Miranda* rights prior to questioning on both days, despite the fact that he asked to speak with an attorney after the first day. *State v. Bishop*, 158 S.E.2d 511, 4 CLB 187.

**Oregon** I. Failure of defendant to specifically state that he did not want a lawyer did not bar a finding of waiver where defendant, after being fully advised of his rights under *Miranda*, indicated that he was familiar with these rights and was willing to make a statement.

II. Court concedes that *Miranda* language "if isolated and taken literally" re-

quires that the record show that the accused was offered counsel but intelligently and understandingly rejected the offer before a waiver could be found. Court, however, is "doubtful that this was what was meant because we can discern neither logic in, nor necessity for, such a requirement." *State v. Matt*, 444 P.2d 914, 4 CLB 540.

**Texas** Defendant's custodial statement to police officer that he was attempting to hire a lawyer did not bar his interrogation on following day. *Hill v. State*, 429 S.W.2d 481, 4 CLB 434.

### §2.30. *Res gestae*, volunteered and spontaneous statements

**Ohio** *Miranda* warnings not necessary in case where interrogation is not initiated by arresting officer. *State v. Perry*, 237 N.E.2d 891, 4 CLB 477.

**Texas** Defendant's statement in response to police officer's question that there was just one person in the building is admissible as verbal act or *res gestae* statement; *Miranda* is inapplicable to such statements. *Hill v. State*, 420 S.W.2d 408 (Court of Criminal Appeals of Texas), 4 CLB 55.

### §2.40. Applicability of *Miranda* to retrials (See also §4.00)

**North Carolina** *Miranda v. Arizona* does not apply to a new trial (after reversal on other grounds) if the original trial took place before the decision in *Miranda*. The Supreme Court's opinion does not answer the question explicitly, but its expressed concern for fair notice to law enforcement officers mandates this result. *State v. Branch*, 161 S.E.2d 492, 4 CLB 433.

### §2.45. Applicability of *Miranda* to misdemeanors and other offenses

**Delaware** Delaware Supreme Court rules that the warnings mandated by *Miranda v. Arizona* are inapplicable to "motor violations." Thus a defendant, charged with driving while intoxicated, who answered questions asked by police officers as to where, when and how much he had been drinking prior to his arrest,

cannot challenge the admissibility of his answers on the ground that the officers failed to advise him of his constitutional rights. *State v. Bliss*, 238 A.2d 848, 4 CLB 250.

**Louisiana** Because it feels the law enforcement should not be burdened by the procedural complexities of *Miranda* in investigating lesser offenses and because *Miranda* itself involved a felony prosecution, the Supreme Court of Louisiana holds that the *Miranda* warnings with respect to the right to counsel need not be given in misdemeanor cases. *State v. Angelo*, 202 So.2d 710, 4 CLB 54.

**§2.50. Statements to persons other than police**

**Illinois** The summoning of a student to the principal's office for questioning is not an arrest; nor is the student in the custody of the police or other law enforcement officials when he enters the office. *Miranda* therefore did not apply to the student's admissions to the principal (citing *People v. P* [Anonymous], 21 N.Y.2d 1, 286 N.Y.S.2d 225, 233 N.E.2d 255). *People v. Shipp*, 239 N.E.2d 296, 4 CLB 478.

**§2.60. Applicability of *Miranda* to other proceedings**

**Arizona** Incriminating statements made by a youthful defendant while under the jurisdiction of a juvenile court may not be used against him when it is later determined that he should be tried as an adult, unless prior to making the statement he and his parent or attorney are warned of the possibility of a criminal trial and of his right to silence. *State v. Maloney*, 433 P.2d 625, 4 CLB 54.

**§3.00. Procedure for determining admissibility**

**Court of Appeals, 2nd Cir.** Trial court is under no obligation to submit issue of voluntariness of incriminating statement to jury where defendant denies having made the statement and defense counsel fails to make a specific request. *United States v. Anderson*, 394 F.2d 743, 4 CLB 241.

**Court of Appeals, 5th Cir.** It is reversible error for trial court to refuse defendant's request that *voir dire* on admissibility of his admissions be conducted outside the presence of jury. *Turner v. United States*, 387 F.2d 333, 4 CLB 39.

**Court of Appeals, 7th Cir.** Upon defendant's *Miranda* objection to admissibility of statement offered by government, trial court must hold hearing outside presence of the jury. *United States v. Nielsen*, 392 F.2d 849, 4 CLB 108.

**§3.20. Burden of proof**

**Court of Appeals, D.C. Cir.** D.C. Circuit (en banc) in the exercise of its supervisory powers adopts rule that a trial judge may not make the preliminary determination of voluntariness of a confession required by *Jackson v. Denno* unless he is satisfied beyond a reasonable doubt that the confession is voluntary. *Pea v. United States*, 397 F.2d 627, 4 CLB 354.

**Pennsylvania** Supreme Court of Pennsylvania rules that in a post conviction *Jackson v. Denno* hearing the prosecutor's burden of persuasion on the issue of voluntariness is not proof beyond a reasonable doubt, but a mere preponderance of the evidence. In applying the standard to the petitioner's confession, court reverses his 1940 conviction on ground that he had been subjected to virtually continuous interrogation by several officers for a period of 10 hours, had not been warned of his right to counsel and his privilege to remain silent, had not been taken to a magistrate until a week after he was taken into custody, and his ability to resist questioning was limited both by his ninth grade education and the wounds he received during his capture. *Commonwealth ex rel. Butler v. Rundle*, 239 A.2d 426, 4 CLB 251.

**Washington** State failed to meet its burden to show that statement had been obtained in compliance with *Miranda* where state failed to call second officer present at interrogation and defendant contradicted first officer's version of what occurred. *State v. Davis*, 438 P.2d 182, 4 CLB 253.

**§4.00. Miranda**

**Court of Appeals, 9th Cir.** Footnote 37 of *Miranda v. Arizona* (stating that the prosecution may not use at trial the fact that an accused stood mute or claimed his privilege in the face of accusation) is not retroactive. *Wilson v. Madigan*, 389 F.2d 97, 4 CLB 121.

**§5.10. Arraignment and preliminary hearing (See also §33.00)**

**North Dakota** An indigent defendant has no right to assigned counsel when brought before a committing magistrate. This is not a "critical stage" of the proceedings, *Hamilton v. Alabama*, 368 U.S. 52, even if the defendant subsequently signs a full confession at the prosecuting attorney's request before being warned of his right to assigned counsel in the trial court and pleading guilty. *State v. Starret*, 153 N.W. 2d 311, 4 CLB 69.

**Wisconsin** The Supreme Court of Wisconsin adopts a prospective rule that counsel is to be appointed for an indigent defendant at his very first appearance in court or before a magistrate to answer the charges against him, unless he explicitly and intelligently waives the right. The reasons cited are the need for assistance in obtaining bail, deciding whether to demand a preliminary hearing, and preparing a trial defense. The court does not specify the future consequences of any failure to observe the rule. *Jones v. State*, 154 N.W.2d 278, 4 CLB 138.

**§5.22. Right to counsel of one's own choosing**

**California** Mandamus lies to compel a trial judge to vacate an order relieving appointed counsel from a case over the mutual objections of both the attorney and the defendant. Regardless of the judge's opinion of the attorney's incompetence, he lacks power to enter such an order. *Smith v. Superior Court of Los Angeles County*, 440 P.2d 65, 4 CLB 378.

**Michigan** Failure to give defendant the opportunity to obtain counsel of his own choice held not to constitute reversible error. *People v. Carl*, 160 N.W. 2d 801, 4 CLB 541.

**§5.25. Misdemeanors**

**Minnesota** As a supervisory and prospective matter, and in order to dispense with speculation about whether *Gideon v. Wainwright*, 372 U.S. 335, requires the appointment of counsel in trials for "non-serious" offenses, the Supreme Court of Minnesota will require appointment of an attorney for any indigent defendant who faces possible incarceration in a penal institution. *State v. Borst*, 154 N.W. 2d 888, 4 CLB 138.

**§5.50. Probation revocation hearing**

**United States District Court (Texas)** There is no constitutional right to the assistance of counsel in a federal probation revocation proceeding. *Mempa v. Rhay*, 389 U.S. 128, distinguished as applying only to deferred sentencing proceedings. *Sammons v. United States*, 285 F. Supp. 100, 4 CLB 417.

**Nevada** Where the petitioner was sentenced to a prison term of from one to five years and the trial court ordered the execution of sentence suspended and the petitioner placed on probation for a five-year period, the petitioner did not have a constitutional right to be represented by counsel during subsequent proceedings involving the revocation of probation. The Supreme Court of Nevada held that the Supreme Court decision in *Mempa v. Rhay*, 389 U.S. 125, was not applicable. *Petition of Du Bois*, 445 P.2d 354, 4 CLB 543.

**New Jersey** There is no constitutional mandate compelling a state to furnish an indigent defendant with assigned counsel at a hearing to determine whether he had been guilty of violating the terms of his probation on a suspended sentence. *State v. Louis*, 234 A.2d 240, 4 CLB 70.

**§5.55. Parole hearings**

**Court of Appeals, 10th Cir.** Tenth Circuit rules that no authority exists to seriously question the constitutionality of 28 C.F.R. § 2.16 which prohibits representation by counsel or any other person at parole hearing. *Schwartzberg v. Board of Parole*, 399 F.2d 297, 4 CLB 594.

**§5.90. Grand jury proceedings**

**Nevada** Defendant does not have a constitutional right to the presence of counsel under *Wade et al.* when brought into grand jury room so he could be identified by rape prosecutrix. *Maiden v. State*, 442 P.2d 902, 4 CLB 435.

**§6.00. Habeas corpus and other post-conviction collateral proceedings**

**Iowa** Assignment of counsel and furnishing of trial minutes to indigent habeas petitioner is neither a constitutional nor a statutory requirement. However, trial court may assign counsel "when the facts in a particular case make such appointment desirable." *Larson v. Bennett*, 160 N.W.2d 303, 4 CLB 436.

**§6.10. Appeals — In general**

**Court of Appeals, 5th Cir.** State prisoner was denied the right of effective assistance of counsel on his direct appeal (as required by *Anders v. California*, 386 U.S. 738) where assigned counsel concluded there was no merit to appeal, proceeded no further, and conviction was affirmed without the filing of a brief or a bill of exceptions. *Merkel v. Beto*, 387 F.2d 854, 4 CLB 38.

**Alabama** Supreme Court of Alabama, on rehearing, reverses its prior decision, and announces that there is no constitutional mandate requiring that an indigent be assigned counsel on appeal on an uncomplicated record based upon a plea of guilty entered while represented by counsel. *Caton v. State*, 205 So.2d 239, 4 CLB 137.

**Illinois** Where defendant convicted of misdemeanor indicates in some manner his desire to appeal, it is duty of trial court to fully advise defendant of his right to do so; indigent misdemeanant not entitled to assigned appellate counsel. *People v. Sanders*, 240 N.E.2d 627, 4 CLB 595.

**Nebraska** Under the Post Conviction Act, it is within the discretion of the district court as to whether or not legal counsel shall be appointed to represent a defendant on appeal to this court and, in the absence of a showing of an abuse of discretion, the failure to appoint coun-

sel is not error. *State v. Jackson*, 155 N.W. 2d 361, 4 CLB 193.

**§7.00. Ineffectiveness in general**

**Court of Appeals, 4th Cir.** Fourth Circuit sets forth minimal standards for effective representation for assigned counsel. Failure to meet such requirements, in the absence of the state's showing of no prejudice, constitutes reversible error. *Coles v. Peyton*, 389 F.2d 224, 4 CLB 118.

**Illinois** Failure of defense attorney to disclose to his client that prosecutor had offered lesser plea requires reversal of the conviction. *People v. Whitfield*, 239 N.E.2d 851, 4 CLB 542.

**§7.01. Delay in assigning counsel**

**Court of Appeals, 9th Cir.** Ten minute interval between assignment of counsel and commencement of three day robbery trial held not to violate defendant's right to effective assistance of counsel. *Allen v. Wilson*, 365 F.2d 881, 2 CLB No. 9, p. 33.

**Mississippi** Defendant's contention that he was precluded from establishing his innocence because he was jailed for 6 hours immediately following his arrest for operating a motor vehicle while under the influence of alcohol and not advised of his right to counsel who, if present, would have insisted upon some scientific test to determine his sobriety, is rejected, although the argument is characterized as "able [and] ingenious." *Capler v. City of Greenville*, 207 So.2d 339, 4 CLB 257.

**§7.10. Conflict of interest in joint representation**

**Court of Appeals, 9th Cir.** Defendant's right to effective assistance of counsel was not denied by trial judge's refusal, on day trial was to commence, to relieve his attorney who also represented co-defendant and who had told the court that "it appears there may be a conflict of interest here." *Glavin v. United States*, 396 F.2d 725, 4 CLB 360.

**Florida** Trial court's failure to assign indigent co-defendants separate counsel requires an automatic reversal of their convictions and new trials. Defendants

need neither object nor show a conflict of interest or prejudice. *Youngblood v. State*, 206 So.2d 665, 4 CLB 257.

**Maryland** Defendant was denied effective assistance of counsel where his assigned counsel, who also represented a co-defendant as retained counsel at a joint trial, argued to the jury in summation "there was more evidence against the [defendant] than there was against the co-defendant." *Caddie v. Warden*, 238 A.2d 129, 4 CLB 257.

**§7.15. Other conflicts of interest**

**Illinois** Where defendant's court-appointed counsel also represented victim of crime, defendant was entitled to reversal even though there was no showing of actual prejudice and even though the accused knew that the attorney also represented the victim. *People v. Stoval*, 239 N.E.2d 441, 4 CLB 482.

**Virginia** Virginia Supreme Court of Appeals disapproves practice of assigning Commonwealth Attorney to represent indigent defendants. It also disapproves practice of trying incarcerated defendant in his prison clothes. Court holds that defendant was not prejudiced when his defense attorney, acting in his capacity as Commonwealth Attorney, served him with an arrest warrant after the trial was completed. *Yates v. Peyton*, 147 S.E.2d 767, 2 CLB No. 6, p. 52.

**§7.40. "Last Minute" assignments**

**Court of Appeals, 3rd Cir.** Third Circuit adopts Fourth Circuit rule that last minute appointment of assigned trial counsel is inherently prejudicial to a defendant's right to counsel, and conviction must be reversed unless state can show that defendant was, in fact, not prejudiced. *United States ex rel. Mathis v. Rundle*, 394 F.2d 748, 4 CLB 245.

**§7.55. Incorrect legal advice**

**Nebraska** Counsel who advises defendant that he will receive a suspended sentence and probation upon a plea of guilty, when the defendant actually receives a sentence of eighteen months, is ineffective as a matter of law. The advice

is so inept as to shock the conscience of the court. *State v. Tunender*, 157 N.W.2d 165, 4 CLB 314.

**§7.60. Failure of trial counsel to protect client's appellate rights**

**New Jersey** Trial counsel's failure to advise the defendant of his right to appeal and his right to assigned counsel on the appeal constitutes a deprivation of effective assistance of counsel and requires that the defendant be afforded an opportunity to file a notice of appeal. *State v. Allen*, 239 A.2d 675, 4 CLB 257.

**§7.65. Trial counsel's admitted ineffectiveness**

**Court of Appeals, 8th Cir.** Eighth Circuit censures attorney for representing to lower court that he had deliberately failed competently to defend case on account of defendant's failure to pay agreed upon fee. *Cross v. United States*, 392 F.2d 360, 4 CLB 178.

**§7.68. Duty of appellate counsel in general**

**Illinois** Right to counsel violated at post-conviction proceeding where assigned counsel failed to communicate with petitioner or examine record of original trial. *People v. Wilson*, 240 N.E.2d 583; *People v. Barnes*, 240 N.E.2d 586; *People v. Craig*, 240 N.E.2d 588, 4 CLB 604.

**Illinois** Failure of assigned counsel to advocate possibly meritorious post-conviction claim constitutes inadequate representation. *People v. Wilson*, 235 N.E.2d 561, 4 CLB 313.

**§7.70. Waiver of right to counsel — in general**

**Court of Appeals, 5th Cir.** Where a defendant at a habeas corpus hearing challenging a state conviction testifies that he was not informed of his right to have counsel but at the time of the conviction "I didn't see a reason for hiring a lawyer when I could [plead guilty and] pay fifty dollars and get turned loose" there was an intelligent and competent waiver of counsel. *Stubblefield v. Beto*, 399 F.2d 424, 4 CLB 603.

**§7.72. Right to defend pro se**

**Illinois** Although defendant has an unqualified right to discharge his attorney and defend pro se prior to the commencement of trial, no such absolute right exists once the trial has begun, and the trial court's refusal to allow a defendant to defend pro se at that point is reversible error only where the defendant can show that he was prejudiced. *People v. Nelson*, 231 N.E.2d 115, 4 CLB 70.

**Court of Appeals, 6th Cir.** Defendant who claims he neither had counsel nor waived his right to counsel may not make use of presumption against waiver of counsel until he can establish that he was in fact unrepresented. *Wilson v. Wilman*, 386 F.2d 968, 4 CLB 42.

**Pennsylvania** Where plea proceedings were not recorded, burden of proving effective waiver of right to counsel is on prosecutor. *Commonwealth ex rel. McKee v. Russell*, 240 A.2d 559, 4 CLB 379.

**§7.80. Sufficiency of advice re the right to counsel**

**Utah** Where trial court advised indigent defendant that he was "entitled to" counsel and defendant indicated that he preferred to plead guilty, defendant's right to counsel was not abridged. *Dyett v. Turner*, 439 P.2d 266, 4 CLB 321.

**§7.85. Procedure for accepting waiver**

**Michigan** After explaining to a defendant his right to appointed counsel if indigent, a trial judge need not demand that the defendant state aloud whether he desires counsel before accepting his plea of guilty without counsel; and if the defendant is of superior intelligence and is familiar with criminal process, it is not even necessary to tell him that he has a right to appointed counsel, so long as he is told of his "right to have a lawyer." *People v. Hobdy*, 158 N.W.2d 392; *People v. Winegar*, 158 N.W.2d 395; *People v. Dunn*, 404; *People v. Stearns*, 158 N.W.2d 409, 4 CLB 380.

**Michigan** "When, as here, a 27-year-old accused, with a criminal record and experience in criminal proceedings and no

showing of mental deficiency or illiteracy, is told by the court that he is entitled . . . to be represented by an attorney and that, if he is financially unable to employ counsel, at his request the court will appoint an attorney for him, and he then says he understands this, but that, knowing what his rights are, he wishes to enter a plea and thereupon does enter a plea of guilty, no exercise in semantics, however exquisite, can lead us to conclude that this was not a knowing and intelligent waiver of counsel. That is all that the cases, Federal and State, now require. Express waiver is not necessary." *People v. Scott*, 160 N.W.2d 878, 4 CLB 543.

**North Carolina** Rape defendant's waiver of counsel in connection with lineup did not carry over to later show-up at which he was required to put on a hat and repeat certain word allegedly spoken by the rapist. *State v. Wright*, 161 S.E.2d 581, 4 CLB 432.

**§8.00. Co-defendant's statement**

**United States Supreme Court** Introduction of co-defendant's confession which implicated the petitioner held to violate petitioner's rights of confrontation and cross-examination notwithstanding trial court's limiting instructions. *Bruton v. United States*, 391 U.S. 123, 4 CLB 233.

**New York Appellate Division** Co-defendant's confession implicating defendant was properly received in evidence where (a) co-defendant testified, (b) no request for redaction was made, (c) trial court gave adequate limiting instructions and (d) evidence of guilt was overwhelming. *People v. Willis*, 292 N.Y.2d 298, 4 CLB 470.

**Michigan** A co-defendant's confession, made in defendant's presence, is not admissible against defendant merely because he made an "admission" ("My attorney told me to stand mute.") in response to it. *People v. Gisondi*, 156 N.W.2d 601, 4 CLB 322.

**§8.15. Use of witness' prior testimony (See also §47.35.)**

**Oklahoma** Habeas corpus petition granted

where transcript of witness' testimony elicited at preliminary hearing (including defense counsel's cross-examination) was received in evidence at trial without showing that witness who was in federal penitentiary was unavailable to testify. In re Bishop, 433 P.2d 768, 4 CLB 422.

**§9.00. What constitutes a search**

**United States Supreme Court** Police officer's discovery of automobile registration card of robbery victim upon opening suspect's impounded automobile to secure the doors and windows did not constitute an illegal search. Harris v. United States, 390 U.S. 234, 4 CLB 102.

**Court of Appeals, 2nd Cir.** Second Circuit citing *Katz v. U.S.*, 389 U.S. 347, 351 (1967) holds "that conversations carried on in a tone of voice quite audible to a person standing outside the home [without trespassing] are conversations knowingly exposed to the public" and are admissible to establish probable cause. United States v. Llanes, 398 F.2d 880, 4 CLB 530.

**Maryland** Police officer's observations through the use of binoculars of activities in defendant's home 150 feet away from the officer's vantage point in a neighbor's house could be used as basis for securing a search warrant, since the officer's conduct was not violative of the Fourth Amendment. Johnson v. State, 234 A.2d 464, 4 CLB 72.

**Maryland** Police officer's act of peering over swinging door to a partitioned toilet booth constitutes a trespass requiring the suppression of narcotics paraphernalia which he saw next to the defendant. Brown v. State, 238 A.2d 147, 4 CLB 258.

**Ohio** Where the telephone company, at the request of a subscriber, attaches a "pen register" to the subscriber's phone, which register records only the origin of calls to the subscriber, there is no illegal search and seizure as to one who calls the subscriber. People v. Hulsey, 239 N.E.2d 567, 4 CLB 483.

**Wisconsin** A police officer who stands

on the front steps of a two-story frame building at 1:00 a.m. in order to peer through the window of a suspect's first-floor apartment is not conducting a "search" within the meaning of the Fourth Amendment. Edwards v. State, 156 N.W.2d 397, 4 CLB 321.

**§9.05. Property subject to seizure**

(For Obscenity, See §81.10)

**Court of Appeals, 6th Cir.** Although not mentioned in search warrant, suit worn by robber held to be instrumentality of crime and as such could nevertheless be seized when discovered by officers during a search of defendant's residence pursuant to warrant. United States v. Alloway, 397 F.2d 105, 4 CLB 419.

**§9.15. Search warrant — sufficiency of underlying affidavit**

**Court of Appeals, 7th Cir.** Search warrant is per se invalid where affiant on sole supporting affidavit uses a false or fictitious name. United States ex rel. Pugh v. Pate, 401 F.2d 6, 4 CLB 361.

**Court of Appeals, 7th Cir.** Seventh Circuit, in upholding search warrant, criticizes preparation of agent's affidavit in support of warrant by U.S. Commissioner. "The Commissioner is not meant to play the dual roles of magistrate and investigator." United States v. Pascente, 387 F.2d 923, 4 CLB 42.

**Colorado** An affidavit in support of a search warrant is sufficient if it is based on information received from an unnamed informant, provided that this information is corroborated by "other matters within the officer's knowledge." Such corroboration may be supplied by the defendant's record of a prior conviction for a similar offense and by additional information received from different anonymous persons. Bean v. State, 436 P.2d 678, 4 CLB 195.

**Illinois** Motion to suppress gun properly denied although search was based on information provided by anonymous informant. People v. Boykin, 237 N.E.2d 460, 4 CLB 483.

**Iowa** If the police have sufficient infor-

mation upon which a search warrant could lawfully issue, but the affidavit actually submitted to the Magistrate in seeking the warrant is insufficient by reason of certain omissions, the warrant is nonetheless valid; it is reasonable to assume that the officer seeking it communicated the additional essential facts orally and under oath to the Magistrate. *State v. Oliveri*, 156 N.W.2d 688, 4 CLB 322.

**Massachusetts** Defect in application for search warrant immaterial where seizure was made incidental to a lawful arrest. *Commonwealth v. Blackburn*, 237 N.E.2d 35, 4 CLB 437.

**Minnesota** Probable cause need not be established from the face of the affidavit alone but may be shown by, e.g., the magistrate's personal interrogation of the affiant or the subsequently established accuracy of the descriptions of the items to be seized. *State v. Campbell*, 161 N.W.2d 47, 4 CLB 546.

**Oregon** Where an affidavit in support of a search warrant for defendant's home, sworn to on February 6th, was based on allegations that defendant had heroin at his home on January 9th, the length of elapsed time was too great to permit the magistrate to find that narcotics were on the premises on the date of the affidavit. The warrant was thus invalid. The Supreme Court of Oregon reasoned that the fact that the defendant was a known narcotics user was not sufficient to fill the time gap, as it was not reasonable to infer that narcotic users have narcotics on their premises at all times. *State v. Ingram*, 445 P.2d 503, 4 CLB 546.

**§9.20. Validity of warrant on its face**

**Court of Appeals, 6th Cir.** \$305,633.25 of U.S. currency was properly seized under search warrant for defendant's residence which authorized a search for "numbers, lottery tickets, adding machines, adding machine tapes, tally sheets, books and records, and other numbers paraphernalia." *United States v. One 1965 Buick*, 392 F.2d 672, 4 CLB 243.

**Florida** Search warrant directing search

of "all persons (within named building) who shall be connected with or suspected of being connected with the operating or maintaining of . . . gaming, or gambling games, devices, equipment, paraphernalia . . ." held not to violate Fourth Amendment. *State v. Cook*, 213 So.2d 18, 4 CLB 436.

**§9.30. Search warrant — manner of execution**

**United States Supreme Court** Federal agents' failure to announce purpose and authority before entering apartment through closed, unlocked door vitiated subsequent search and seizure. *Sabbath v. United States*, 391 U.S. 585, 4 CLB 300.

**Court of Appeals, 3rd Cir.** Third Circuit holds that execution of warrant marked "search in the daytime" at 2:30 A.M. renders search and seizure *per se* unreasonable. *U.S. ex rel. Boyance v. Myers*, 398 F.2d 896, 4 CLB 530.

**Court of Appeals, 9th Cir.** Following recent decision of California Supreme Court in *People v. Gastelo*, 432 P.2d 706, Ninth Circuit rules that general belief that destruction of evidence was likely in certain type of crime was not, by itself, sufficient to justify otherwise illegal unannounced forcible entry. Statutory requirement of announcement of identity and purpose may only be dispensed with when justified by specific facts of individual case. *Meyer v. United States*, 386 F.2d 715, 4 CLB 43-44.

**California** The Supreme Court of California refuses to hold that an officer executing a search warrant for narcotics need never state his authority and demand admittance before entering forcibly; the right to do this depends upon the exigencies of each particular case. *People v. Gastelo*, 432 P.2d 706, 4 CLB 71.

**Ohio** Where search warrant had been issued upon probable cause, failure of police to possess warrant when commencing search did not require suppression of evidence. *State v. Johnson*, 240 N.E.2d 574, 4 CLB 606.

**§9.40. Search warrant — necessity of obtaining a warrant**

**Court of Appeals, 1st Cir.** First Circuit, finding that *Trupiano v. United States*, 334 U.S. 699, is still viable, invalidates seizure of stolen goods incident to warrantless arrests on probable cause where federal agents had probable cause to make the search and the arrests for twelve hours prior thereto and failed to obtain any warrant. *Nird v. United States*, 388 F.2d 535, 4 CLB 119.

**§10.00. Search incident to a valid arrest — in general**

**California** Arrest pursuant to constitutionally defective warrant justified on basis of independent "probable cause"; evidence seized is admissible. *People v. Chimel*, 439 P.2d 333, 4 CLB 322.

**New Jersey** Search of defendant's person after arrest for minor traffic violation limited to *bona fide* search for weapons. *State v. Campbell*, 225 A.2d 235, 4 CLB 71.

**Oregon** Even if defendant's initial transportation to the police station was an unlawful arrest, the later discovery of an outstanding valid warrant for his arrest enabled the police to rearrest him lawfully at the police station; and a search of his person conducted contemporaneously with the latter arrest was constitutionally permissible. *State v. Dempster*, 434 P.2d 746, 4 CLB 138.

**§10.10. Search incident to a valid arrest — probable cause**

**Ohio** Where officer received communication over police radio that appellant had assaulted persons with a gun, that he was still armed, and that an arrest warrant had been issued, the officer had probable cause to make the arrest. *State v. Fultz*, 234 N.E.2d 593, 4 CLB 257.

**§10.15. Search incident to a valid arrest — combined police information in determining probable cause**

**Court of Appeals, Dist. of Columbia** "There is, however, another issue which appellant has not raised but which recurs

in cases of this sort and which we think appropriate to mention. Where there is a challenge to an arrest based on a police lookout, the government should, when challenged, be required to produce a tape or log entry of that lookout if such proof exists, as it usually does. For only the tape or log entry is the best evidence of the information contained in the lookout." *Daniels v. United States*, 393 F.2d 359, 4 CLB 179.

**Maryland** Requirement of probable cause satisfied when arresting officer received information through official police communication. *Hale v. State*, 245 A.2d 908, 4 CLB 606.

**§10.20. Manner of making arrest as affecting its validity**

**Maryland** Police officer's failure to give notice of his purpose and authority before entering the defendant's hotel room vitiates the legality of the subsequent arrest and search. *Berigan v. State*, 236 A.2d 743, 4 CLB 194.

**§10.25. Permissible scope of incidental search**

**Oregon** Where defendant had been frisked immediately after his arrest on traffic charges, the subsequent inspection of his wallet which revealed a partially consumed marijuana cigarette was not valid as a search incident to an arrest, since the inspection of defendant's wallet did not reasonably relate to defendant's "criminal" acts of driving without a license plate, driving with expired registration, and driving without a valid operator's license. *State v. Van O'Neal*, 444 P.2d 951, 4 CLB 545.

**§11.00. Consent — in general**

**Court of Appeals, 2d Cir.** Where corporate records of brokerage firm were voluntarily turned over to S.E.C. for examination, subsequent transfer of the record to the United States Attorney and their use in a criminal prosecution against the corporate officers was not an illegal seizure. *United States v. Light*, 394 F.2d 908, 4 CLB 247.

**Maine** Defendant's consent to search his home given at a time when he was aiding the police in investigating his wife's death does not authorize search of his home the following day after his arrest for her murder; nor does a warrant authorizing a search for a "container or vial of methyl alcohol" justify a seizure of funnels, jars and cloths. *State v. Brochu*, 237 A.2d 418, 4 CLB 193.

**Georgia** A father can give valid consent to the search of his 19-year-old son's car. *Tolbert v. State*, 161 S.E.2d 279, 4 CLB 380.

### **§11.30. Consent — voluntariness of consent**

**United States Supreme Court** Where police were admitted to search petitioner's home on the claimed authority of a warrant, there was no showing of a free and voluntary waiver of Fourth Amendment rights. Prosecutor's representation to Supreme Court that warrant existed did not justify remand to state court to determine its validity where prosecutor explicitly disclaimed reliance on warrant at trial. *Bumper v. North Carolina*, 391 U.S. 543, 4 CLB 299.

**Court of Appeals, 6th Cir.** Sixth Circuit rules that failure to advise a defendant of his right to withhold a consent to search is "only one factor to be considered" in determining whether consent was intelligently given. "To advise a person with experience or training in this field that he has the right to refuse consent would be a waste of words. To fail to so advise another, who by low mentality or inexperience is obviously ignorant of his rights, might in some cases be decisive. Other cases would doubtless fall between these two extremes." *Rosenthal v. Henderson*, 389 F.2d 514, 4 CLB 112-113.

**California** A search of a room, made upon "consent" obtained from a suspect immediately following an illegal search (but no arrest) of his person, is inextricably bound up with the illegal police activity and cannot be sustained. *People v. Johnson*, 440 P.2d 921, 4 CLB 380.

**Illinois** Police need not advise defendant in custody that he has a right not to consent to the search of his apartment. Trial court's finding that defendant consented to search would not be overturned "unless it is clearly unreasonable." *People v. Lederf*, 232 N.E.2d 684, 4 CLB 140.

**Minnesota** Court finds appellant consented to the taking of a sample of his blood while lying in an oxygen tent under sedation the day after he was operated on for a stab wound in the chest. *State v. Campbell*, 161 N.W.2d 47, 4 CLB 546.

**Rhode Island** Failure of the police to advise the defendant of his right to refuse to consent to their search of his automobile does not vitiate his consent to search. Rhode Island Supreme Court refuses to extend *Miranda v. Arizona* to such a situation, noting that the United States Court of Appeals for the First Circuit has ruled similarly in *Gorman v. United States* (380 F.2d 158). *State v. Leavitt*, 237 A.2d 309, 4 CLB 193.

### **§12.00. Stop and frisk**

**United States Supreme Court** Supreme Court upholds stop and frisk where officer had reasonable grounds to believe: (a) that defendant was armed and dangerous; (b) that it was necessary to take swift action for self-protection; and (c) scope of search was limited to patting outer garments. *Terry v. State of Ohio*, 392 U.S. 1, 4 CLB 301.

**United States Supreme Court** Where officer suspected narcotics activity but had insufficient reason to suspect that defendant was armed, placing of hand in defendant's pocket simultaneously with defendant was illegal search. *Sibron v. New York*, 392 U.S. 40, 4 CLB 303.

Where officer saw two strangers tiptoeing through residential apartment building, who fled when officer gave chase, there was probable cause to arrest. *Peters v. New York*, 392 U.S. 40, 4 CLB 304.

### **§14.00. Border searches**

**Court of Appeals, 4th Cir.** Customs official's search of longshoremen's cars

parked in lot adjacent to port without either a warrant or probable cause upheld as a valid "border search" despite the fact that neither the longshoremen nor their cars has crossed the "border." *United States v. McGlone*, 394 F.2d 75, 4 CLB 246.

**Court of Appeals, 9th Cir.** Border search held unreasonable and in violation of due process where defendant's rectum was probed without search warrant and in the absence of clear indication of narcotics. *Huguez v. United States*, 406 F.2d 365, 4 CLB 492.

#### §16.00. Automobile searches

**Maryland** Search of New York City patrolman's car by Maryland state troopers upon pretext of traffic violation is violative of Fourth Amendment. *Sedacca v. State*, 236 A.2d 309, 4 CLB 139.

**Michigan** The fact that a defendant hinders police action by hiding the key to the trunk of his car does not justify the police, after they find the key, in conducting a search of the trunk neither contemporaneously with the arrest of defendant nor pursuant to any warrant. *People v. Dombrowski*, 159 N.W.2d 336, 4 CLB 436.

**New Hampshire** Supreme Court of New Hampshire rules that the practice of stopping all cars in a lane for a routine check of licenses and registrations is valid providing it is done in a bona fide endeavor to enforce the license and registration provisions of our law; on the other hand, if it was done as a subterfuge to discover proof of other crimes, then the evidence seized as a result of the stopping should have been suppressed. Court remands case for a further hearing on the issue of good faith. *State v. Severance*, 237 A.2d 683, 4 CLB 257.

**New York** Vehicle towed away because it was illegally parked could not be lawfully searched without warrant. *People v. Sullivan*, 292 N.Y.2d 37, 4 CLB 482.

**Oregon** The warrantless search of the trunk of an unoccupied car taking place while the owner is nowhere to be found

and twenty minutes before he is found nearby and arrested, is not unreasonable. *State v. Elk*, 439 P.2d 1011, 4 CLB 322.

**Texas** Search of defendant's automobile not conducted at the scene of the defendant's arrest for a traffic offense is nonetheless valid; *Preston v. California* (376 U.S. 364) is to be distinguished. *Taylor v. State*, 421 S.W.2d 403, 4 CLB 138.

#### §17.00. Abandonment

**Court of Appeals, Dist. of Columbia** Defendant who is found to have "abandoned" his apartment has no standing to object to police officers' search of apartment and seizure of items therein even though at the time they conducted the search the officers had no reason to believe that an abandonment had occurred. *Parman v. United States*, 399 F.2d 559, 4 CLB 246.

#### §20.00. Standing

**Court of Appeals, 1st Cir.** Fact that defendant was charged with possession of stolen goods transported in interstate commerce is enough to give him standing to move to suppress. Court declines to follow Third Circuit contrary ruling in *United States v. Konigsberg*, 336 F.2d 844, cert. denied, 379 U.S. 933 (1964). *Niro v. United States*, 388 F.2d 535, 4 CLB 119.

**Maryland** Passenger in automobile has standing to object to seizure of property from trunk. *Kleingart v. State*, 234 A.2d 288, 4 CLB 73.

#### §21.20. The evidentiary hearing —

##### Disclosure of informant's identity

**Hawaii** In deciding whether to compel the disclosure of the identity of a confidential informant who is supposed to have provided the police with probable cause to arrest, the court should consider the possibility that the police officer who mentioned the informant is perjuring himself. *State v. Texeira*, 433 P.2d 593, 4 CLB 64.

#### §22.00. Exclusion of evidence as fruit of the poisonous tree

**Court of Appeals, 3rd Cir.** Fact that safe

deposit box was seized and opened in violation of state law does not prevent testimony as to its opening in Federal prosecution. *United States v. Scolnick*, 392 F.2d 320, 4 CLB 120.

**California** Arrest warrant based on police officer's "information and belief" held constitutionally defective for failure to identify source of information; invalid arrest "taints" handwriting exemplars given by defendant after arrest. *People v. Sessin*, 439 P.2d 321, 4 CLB 312.

**§22.50. Electronic eavesdropping — in general**

**Maryland** Police eavesdropping via an extension phone of defendant's telephone conversation does not violate the Maryland Wire Tapping Act where it is with the consent of the other party to the conversation. *Clark v. State*, 237 A.2d 768, 4 CLB 255.

**§22.55. Consent of one of parties to telephone conversation**

**Massachusetts** Motion to suppress recorded telephone communications was properly denied where police acted with consent of one of the parties to the conversation. *Commonwealth v. Miami*, 237 N.E.2d 674, 4 CLB 485.

**§22.60. Electronic eavesdropping — Recording devices**

**Court of Appeals, 5th Cir.** Defendant's Fourth Amendment rights were not violated when his conversations with government informer inside his apartment were overheard by government agent stationed outside apartment house via electronic transmitter concealed on informer's person. *Dancy, Jr. v. United States*, 395 F.2d 636, 4 CLB 111.

**Court of Appeals, 7th Cir.** Electronic eavesdropping of conversations between two government employees through bug planted in office of one of them held to violate Fourth Amendment rights of the other. *United States v. Hagarty*, 388 F.2d 713, 4 CLB 111.

**§23.00. Silence as an admission**

**Court of Appeals, District of Columbia** D.C. Circuit holds prosecutor's cross-examination as to defendant's silence at the time of his arrest violative of privilege against self-incrimination even through no actual interrogation took place. *Gillison v. United States*, 399 F.2d 586, 4 CLB 361.

**Florida** Presumption of unexplained possession of stolen goods held invalid under *Miranda*. *Young v. State*, 203 So. 2d 650, 4 CLB 67.

**Florida** Arresting officer's testimony concerning the defendants' silence when questioned at the time of their arrest required reversal of their convictions, notwithstanding court's attempt to cure the error. *Galasso v. State*, 207 So.2d 45, 4 CLB 253.

**Nebraska** It is reversible error to permit a police officer to testify that the defendant was warned of his *Miranda* rights if the prosecution does not actually introduce any statements or confessions made by him. Such testimony may permit an inference of guilt through his mere apparent silence in the face of the warnings. *State v. Whited*, 154 N.W.2d 508, 4 CLB 141.

**§23.20. Fingerprints**

**Court of Appeals, 9th Cir.** Fingerprint and handwriting exemplars without giving *Miranda* warnings held admissible under authority of *Schmerber v. California*, 384 U.S. 757 and *Gilbert v. California*, 388 U.S. 263. *Gregory v. United States*, 391 F.2d 281, 4 CLB 180.

**§23.30. Handwriting specimens**

**Iowa** Seizure of forger's personal documents at booking in station house is not a violation of Fourth or Fifth Amendment rights where documents are used at trial solely for purposes of comparison. *Hawkins v. Bennett*, 160 N.W.2d 487, 4 CLB 438.

**§23.40. Line-up**

**New Mexico** A suspect's privilege against self-incrimination is not violated

by exhibiting him before the victim for purposes of identification. *State v. Ramirez*, 434 P.2d 703, 4 CLB 134.

**§23.80. Right of defendant to refuse to submit to examination by state psychiatrist where defense is insanity**

**Court of Appeals, 4th Cir.** Federal district court has inherent power to order defendant who has raised defense of insanity, submitted to examination by his own psychiatrists, and presented testimony in support of his defense, to submit to psychiatric examination conducted at the instance of the prosecution. Such an examination does not *per se* violate the defendant's privilege against self-incrimination, nor does the defendant have a right to have an attorney present. However, any evidence of guilt adduced during the course of the examination may not be introduced at the trial. *United States v. Albright*, 388 F.2d 719, 4 CLB 121.

**§23.82. Dismissal of public officials**

**New York** New York's constitutional provision providing for dismissal of public officers who refuse to waive immunity before a grand jury inquiring into their conduct in office does not conflict with Fifth Amendment's privilege against self-incrimination. Provision held to apply to any person in public employment. *State v. Perla*, 21 N.Y.2d 608, 4 CLB 196.

**§23.85. Testimony before grand jury pursuant to subpoena**

**Maryland** Despite the fact that the defendant might have orally requested permission to appear before the grand jury, in the absence of an express or implied waiver of immunity, his testimony before the grand jury violated his privilege against self-incrimination as guaranteed by state statute (exempting grand jury witness in bribery investigations from prosecutions), thereby necessitating a quashing of the indictment. *State v. Panagoulis*, 239 A.2d 145, 4 CLB 258-259.

**§23.88. Defendant's bank records**

**Indiana** Introduction of records held by

bank pertaining to appellant's checking account did not violate appellant's Fourth or Fifth Amendment rights since documents belonged to bank and were properly in its possession. *Leonard v. State*, 232 N.E. 2d 882, 4 CLB 140.

**§23.50. Statutory reporting requirements**

**Court of Appeals, 2nd Cir.** The privilege against self-incrimination is no defense to a prosecution for selling narcotics without a mandatory written order form (to be supplied by the prospective purchaser), under 26 U.S.C. 4705(a). *United States v. Minor*, 398 F.2d 511, 4 CLB 365.

**§23.95. Registration requirement**

**United States Supreme Court** Prosecution for failing to register and pay Federal gambling tax may be successfully defended on Fifth Amendment grounds. Privilege against self-incrimination applicable to prospective as well as past and present acts. *Marchetti v. United States*, 390 U.S. 39, 4 CLB 103.

**United States Supreme Court** Fifth Amendment's privilege against self-incrimination clause is applicable to Federal excise and occupational taxes on wagering, and conspiracy to evade taxes. Convictions reversed notwithstanding failure to properly assert privilege in court below. *Grosso v. United States*, 390 U.S. 62, 4 CLB 105.

**United States Supreme Court** Court reverses conviction for possession of unregistered firearm on self-incrimination grounds. *Haynes v. United States*, 390 U.S. 85, 4 CLB 106.

**Court of Appeals, 10th Cir.** Defendant's voluntary plea of guilty to possessing an unregistered shotgun, in violation of 26 U.S.C. 5851, constituted a waiver of his right to assert the defense of the privilege against self-incrimination on appeal even though intervening Supreme Court decision in *Haynes v. United States* held that a Fifth Amendment claim in such a prosecution would be successful. *Whaley v. United States*, 394 F.2d 399, 4 CLB 248.

**§24.02. Cause of delay**

**Washington** The right to a speedy trial is not violated by a delay of eighteen months between arrest and trial if the defendant requests most of the adjournments in the belief, however fallacious or unreasonable, that he will shortly obtain funds with which to retain counsel. *State v. Wells*, 433 P.2d 869, 4 CLB 74.

**§24.20. Demand for speedy trial as prerequisite to motion to dismiss**

**South Dakota** Where defendant did not demand a prompt trial, three-year interval between filing of complaint and prosecution of forgery charge held not a denial of speedy trial where delay was occasioned by defendant's imprisonment in another state. *State v. Harrison*, 160 N.W.2d 415, 4 CLB 438.

**§24.30. Effect of filing of nolle prosequi**

**Florida** Florida prosecutor's filing of *nolle prosequi* does not violate defendant's right to a speedy trial. *Klopfer v. North Carolina*, 386 U.S. 213, distinguished on ground that whereas North Carolina defendant was still subject to prosecution on original pleading even after filing of *nolle*, Florida defendant was not. Defendant's motion to quash identical information filed subsequent to *nolle* and within statute of limitations should not, therefore, have been granted. *People v. Sokol*, 208 So.2d 156, 4 CLB 260.

**Massachusetts** Defendant was denied right to speedy trial where prosecutor entered *nolle prosequi* upon trial court's refusal to grant prosecution thirty day continuance, and thereafter presented case to grand jury. *Commonwealth v. Thomas*, 233 N.E.2d 25, 4 CLB 141.

**§24.45. Requirement of prejudice**

**District of Columbia** Five-and-one-half month delay after defendant cab driver in negligent homicide prosecution announced he was ready — which delay was attributable solely to the prosecution — deprived defendant of his right to a speedy trial. Although defendant was not incarcerated, court found he was

prejudiced in that his driver's license had been suspended *pendente lite* and his ability to find substitute employment was thus impaired. *United States v. Young*, 237 A.2d 542, 4 CLB 260.

**§25.00. Right to counsel**

**Court of Appeals, 2nd Cir.** Pre-accusatory stage identification of defendant in the absence of counsel held not to violate Wade, Gilbert, and Stovall. *United States v. Davis*, 399 F.2d 948, 4 CLB 357.

**§25.02. Waiver of right to counsel**

**North Carolina** Rape defendant's waiver of counsel in connection with lineup did not carry over to later show-up at which he was required to put on a hat and repeat certain word allegedly spoken by the rapist. *State v. Wright*, 161 S.E.2d 581, 4 CLB 432.

**§25.05. Delay in arraignment**

**Court of Appeals, 4th Cir.** Assuming, without deciding, that the McNabb-Mallory exclusionary rule applies to identifications made during an unnecessary delay in arraignment in violation of Rule 5(a), F.R.Cr.P., Fourth Circuit rules that under circumstances of case a two-hour delay was not "unnecessary."

Fourth Circuit declines to exercise its supervisory powers to exclude identification testimony tainted by allegedly improper conduct of F.B.I. agents. *United States v. Quarles*, 387 F.2d 551, 4 CLB 40.

**§32.75. Right to bail — Justification of sureties, etc.**

**Court of Appeals, 4th Cir.** Fourth Circuit upholds right of Federal district court to set bail for defendant (H. Rap Brown) arrested on a state extradition warrant, and declines to set aside condition imposed by district court confining defendant to the custody of his attorney in the Southern District of New York except when he must leave it for court appearances. *Brown v. Fogel*, 387 F.2d 692, 4 CLB 38.

**§33.00. The preliminary hearing**

**New Mexico** If, at any time during the

proceedings against him, it is shown that the defendant did not have a preliminary hearing before a magistrate and that he did not validly waive his right to one, the trial court lacks jurisdiction of the case and must remand to the magistrate for a preliminary hearing. *State v. Vega*, 433 P.2d 504, 4 CLB 66.

**Virginia** Defense counsel has no right to attempt to use a preliminary hearing as a vehicle for inquiry into the circumstances under which a confession was taken from the defendant. *Williams v. Commonwealth*, 160 S.E.2d 781, 4 CLB 319.

**Wisconsin** A coroner's inquest into cause of death is not an unconstitutional proceeding resulting in a premature finding of guilt without an opportunity for the person found responsible to appear by counsel and cross-examine witnesses. Nor, if it generates publicity, does it require the person subsequently charged with crime to choose between his right to a speedy trial and his right to be tried by a jury chosen from his community — should he decide that either a change of venue or a delay should be sought because of the publicity. *State ex rel. Schulter v. Roraff*, 159 N.W.2d 25, 4 CLB 378.

**§33.70. Grand jury proceedings — Subpoenas**

**Court of Appeals, 2nd Cir.** First National City Bank of New York cannot refuse to honor Federal grand jury subpoena directing it to turn over certain customer records in one of its German branches on ground that it would thereby be subject to civil suit under German bank secrecy law. *United States v. First National City Bank*, 396 F.2d 897, 4 CLB 355.

**§33.73. Immunity (See §54.69.)**

**§34.20. Motions addressed to the indictment or information — Sufficiency of indictment**

**North Carolina** An indictment for "the abominable and detestable crime against nature, to wit: male and male," is not insufficient for its failure to name or identify the other person alleged to have been involved in the crime with the defendant.

*State v. Stokes*, 161 S.E.2d 53, 4 CLB 373.

**§35.58. — Conditioning defense discovery on discovery by prosecution**

District Court, in exercise of discretion, declines to condition defendant's right to discovery, under Rule 16(c), F.R.Cr.P., upon defendant's furnishing government with books, records, etc., which defendant intends to produce at trial. *United States v. Fratello*, 44 F.R.D. 444 (S.D.N.Y.), 4 CLB 413.

**§36.00. Severance**

**District of Columbia** Denial of defendant's motion for a separate trial not reversible error because co-defendant's trial testimony conflicted with defendant's intended defense. *Turner v. United States*, 241 A.2d 763, 4 CLB 428.

**§36.10. Change of venue (See also §55.60)**

**Indiana** Summary denial of uncontradicted application for change of venue was reversible error. *Hanrahan v. State*, 241 N.E.2d 143, 4 CLB 610.

**Michigan** The trial court did not abuse its discretion in denying defendant's pre-trial motion for a change of venue on grounds of adverse publicity where the court was able to impanel a jury satisfactory to both prosecution and defense counsel. *People v. Havey*, 160 N.W.2d 629, 4 CLB 474.

**§36.25. Motions by indigent defendant — Free transcript of preliminary hearing or prior trial**

**Texas** Court of Criminal Appeals of Texas, disagreeing with Supreme Court of Illinois (*People v. Miller*, 221 N.E.2d 653), holds that indigent defendant is not entitled, on retrial, to minutes of first trial which had resulted in hung jury. Court notes that in this case defendant was being represented by the same assigned counsel on both trials and his motion for the minutes was filed only four days before the second trial was to begin. *Perbetsky v. State*, 429 S.W.2d 471, 4 CLB 427.

**§36.30. Motions by indigent defendant — Issuance and service of subpoenas without payment of fees**

Court of Appeals, 1st Cir. Trial court's denial of *in forma pauperis* subpoena because defendant declined to disclose subject matter of prospective witness' testimony in the presence of the prosecutor was error. *Holden v. United States*, 393 F.2d 276, 4 CLB 243.

**§37.00. Plea bargaining**

Court of Appeals, 2nd Cir. Trial judge's promise of a definite sentence did not render plea involuntary where promise was not made until after plea was offered and plea was obviously the result of the prosecutor's agreement to recommend a stated sentence to the judge.

Trial judge's participation in plea discussions does not *ipso facto* render plea involuntary. *United States ex rel. Rosa v. Follette*, 395 F.2d 721, 4 CLB 413.

**Nebraska** A defendant is entitled to a separate trial if his co-defendant's confession inculcates him. The harm in refusing a severance in such a case is not undone if, after the introduction of the confession, the co-defendant takes the stand and retracts it — particularly if the two defendants are represented by one attorney. *State v. Montgomery*, 157 N.W.2d 196, 4 CLB 324.

**New Jersey** Denial of pre-trial motion for severance of counts based upon acts of a same or similar character constituted an abuse of discretion where prejudice was likely. *State v. Orlando*, 244 A.2d 506, 4 CLB 547.

**§37.02. Plea to charge not contained in indictment**

**Michigan** Although State law holds that any felony-murder is murder in the first degree, it is proper to accept a plea of guilty to the crime of murder in the second degree from a defendant charged with felony-murder. *People v. Collins*, 156 N.W.2d 566, 4 CLB 317.

**§37.20. Procedure to be followed by trial judge in determining whether plea should be accepted — Duty to advise defendant of possible sentence**

**Michigan** Under a statute requiring the court to warn a defendant of the "consequences of his plea" before accepting his guilty plea, it is not necessary to inform him of the length of the possible prison sentence he faces. He must only be warned that by a plea of guilty he waives the right to be tried. *People v. White*, 154 N.W.2d 1, 4 CLB 60.

**§37.30. Procedure to be followed by trial judge in determining whether plea should be accepted — Duty to inquire as to voluntariness of plea**

Court of Appeals, 5th Cir. Guilty plea entered by defendant a short while after he had been administered shot of narcotics by doctor and without any inquiry by trial judge as to the defendant's understanding held invalid. *Manley v. United States*, 396 F.2d 699, 4 CLB 357.

**§37.40. Procedure to be followed by trial judge in determining whether plea should be accepted — Ritualistic formula not necessary**

**New York** The New York Court of Appeals refuses to promulgate a "catechism" of rules to be followed by trial courts in determining whether a proffered plea of guilty is voluntarily entered, whether it has a factual basis, and whether the defendant knows what he is doing. *People v. Nixon*, 21 N.Y.2d 338, 4 CLB 59.

**§37.42. — Duty to inquire as to factual basis for plea**

**Michigan** When a defendant gives the court an account of the facts which is materially inconsistent with his guilt, his offered plea of guilty to the crime in question must not be accepted. *People v. Johnson*, 154 N.W.2d 16, 4 CLB 61.

**§37.52. Misunderstanding**

**Colorado** The use of the word "feloni-

ously" in the description of an act charged in a misdemeanor complaint could not confuse any reasonable defendant as he contemplates what plea he will enter. The word in such a context simply denotes *mens rea* as an element of the crime charged. *Petition of Brown*, 436 P.2d 693, 4 CLB 190.

**§37.56. Involuntariness of plea — Court's failure to advise defendant of consequences of plea**

**Michigan** Failure of the trial court to mention possible penalty before acceptance of guilty plea did not entitle twenty-eight-year-old defendant who had been convicted of at least six prior felonies to a reversal of conviction. *People v. Wyn-gaard*, 160 N.W.2d 609, 4 CLB 474.

**§40.10. Guilty plea as waiver of all prior jurisdictional defects**

**Iowa** Supreme Court of Iowa holds that where one pleads guilty, he forfeits his right to litigate the issue of the voluntariness of any statements and the court may consider these statements in sentencing him. *State v. Delano*, 161 N.W.2d 66, 4 CLB 534.

**§41.00. Proceeding to determine defendant's competency to stand trial**

**Washington** Permanent amnesia which prevents a defendant from recalling any of the facts of the killing of his wife, does not by itself render him incompetent to stand trial and to assist in his defense. "Unless an accused is legally insane, the law is not and should not be so unrealistic as to *permanently free, without acquittal* by a Judge or jury, a person against whom a *prima facie* case of murder is made out." *Commonwealth ex rel. Cum-mins v. Price*, 218 A.2d 763 (Pa. 1966). *State v. McClendon*, 437 P.2d 421, 4 CLB 183.

**Washington** Where defendant had previously been adjudicated a psychopathic delinquent, had been remitted to a mental institution, and maintained he was incom-

petent to stand trial, trial court's action in conditioning the granting of his motion for a continuance for the purpose of determining his mental competency upon his entering a plea of not guilty by reason of insanity, was an abuse of discretion. A defendant may not be required to plead not guilty by reason of insanity as a condition to raising the issue of his competency to stand trial. *State v. Tate*, 444 P.2d 150, 4 CLB 477.

**§43.01. Qualifications of trial judge — in general**

**Arizona** It is not a violation of one's constitutional rights to be tried by a jury before a justice of the peace who is not an attorney. Such a judge may lawfully instruct a jury on the applicable law, and the possibility of judicial error does not constitute a deprivation of due process. *Crouch v. Justice of Peace Court*, 440 P.2d 1000, 4 CLB 373.

**§43.02. Disqualification of trial judge**  
**Court of Appeals, 2nd Cir.** Where a criminal case of any length and complexity is to be retried, the retrial should be before a judge other than the one who presided at the first trial. *United States v. Simon*, 393 F.2d 90, 4 CLB 245.

**§43.10. Defendant's right to a public trial**

**Virginia** Trial conducted in judge's chambers without affording members of the general public opportunity to view the proceedings deprived the petitioner of his constitutional right to a public trial. *Jones v. Peyton*, 158 S.E.2d 179, 4 CLB 137.

**Virginia** Trial in judge's chambers held not to violate defendant's constitutional right to a public trial where defendant was unable to establish that the public had been excluded. *Via v. Peyton*, 284 F. Supp. 961, 4 CLB 417.

**§43.15. Defendant's right to appear in civilian clothes**

**Court of Appeals, 5th Cir.** Although he was brought to court to stand trial in his

prison garb, Kilby Prison inmate was not thereby deprived of fair trial where he was supplied with a pair of coveralls, albeit ill-fitting ones, which he wore over his prison clothing, his shoes were "regular," and a white shirt collar could be seen under the coveralls. *Tillery v. United States*, 396 F.2d 790, 4 CLB 356.

**§43.20. Absence of defendant or his counsel**

**Court of Appeals, Dist. of Columbia** D.C. Circuit remands case for evidentiary hearing where trial judge completes trial in the defendant's absence pursuant to Rule 43, F.R.Cr.P., after concluding that defendant had voluntarily absented himself. *Cureton v. United States*, 396 F.2d 671, 4 CLB 175.

**§43.45. Right to jury trial**

**United States Supreme Court** Provision of Federal Kidnapping Act which authorized death penalty only upon jury recommendation held to violate Fifth Amendment right to be free from coerced guilty plea and Sixth Amendment right to demand jury trial. *United States v. Jackson*, 390 U.S. 570, 4 CLB 172.

**United States Supreme Court** Sixth Amendment for serious offenses held applicable to state prosecutions. Jury trial must be available even though actual punishment was only 60 days imprisonment. *Duncan v. Louisiana*, 391 U.S. 145, 4 CLB 236.

**Court of Appeals, 6th Cir.** *United States v. Jackson*, 390 U.S. 570 (holding the death penalty clause of the Federal Kidnapping Act unconstitutional), may not be used to upset federal kidnapping conviction of defendant who was tried by a jury and received a death sentence which was subsequently commuted to life imprisonment. "Under that decision, only three categories of convicted kidnappers can contest their convictions: defendants who pleaded guilty, defendants who waived a jury trial, and defendants who demanded a jury trial and are now under a sentence of death," *Robinson v. United States*, 394 F.2d 823, 4 CLB 307.

**New York** As a crime punishable by imprisonment of up to one year is a "serious crime" rather than a "petty crime" under the standards set forth by the Supreme Court in *Duncan v. Louisiana*, 391 U.S. 145, the defendants who were charged with the crime of possession of burglar tools which is punishable by imprisonment of up to one year were entitled to a jury trial. *People v. Bowdien*, 293 N.Y.S.2d 748, 4 CLB 599-600.

**New York** Because of the heavy volume of cases in the criminal courts of New York City, the defendant although charged with a serious misdemeanor, is not entitled to a jury trial. *People v. Moses*, 294 N.Y.S.2d 12, 4 CLB 600.

**§44.00. Conduct of trial judge — In general**

**Michigan** In a non-jury trial, it is reversible error for the judge (1) to cross-examine witnesses and the defendants in the manner of prosecuting attorney and (2) to increase the defendants' bail substantially, on his own motion, after the prosecution's case and before any evidence for the defense. Such conduct evinces a prejudgment of the issues and prevents a fair trial. *People v. Smith*, 159 N.W.2d 174, 4 CLB 422.

**§44.08. — Expressions of personal opinion**

**Missouri** Supreme Court of Missouri refuses to rule that the novel "Candy" is not obscene as a matter of law but reverses obscenity conviction because trial court failed to remain impartial and conveyed his personal opinion to the jury as to the book's obscenity. *State v. Smith*, 422 S.W.2d 50, 4 CLB 190.

**§44.10. Conduct of trial judge — Examination of witnesses**

**Michigan** Action of trial judge in non-jury trial on conducting his own intensive examination of each witness destroyed the adversary nature of the proceedings and thereby necessitated a new trial. *People v. Wilder*, 160 N.W.2d 749, 4 CLB 470.

**§44.15. Conduct of trial judge —  
Statements as constituting a  
comment on defendant's failure  
to testify**

**Florida** Trial court's inadvertent charge that "... the defendant has testified in this case, which he has a right to do under the laws of this state ..." when, in fact, he did not testify, did not constitute a comment upon his failure to testify, since the trial court, upon being corrected by defense counsel, immediately told the jury "this was the court's error in that the defendant did not take the stand and I am about to instruct you on that. You will disregard this particular charge which should have been given where the defendant does take the stand ... I will now give you the instruction that applies in this case where the defendant did not take the stand ..."; and the court then charged that the defendant was under no duty to testify and that no unfavorable inference could be drawn from his failure to testify. *Bridges v. State*, 207 So.2d 48, 4 CLB 258.

**Pennsylvania** Trial judge's charge to the jury ("the defendant did not personally take the stand. It becomes incumbent on me to charge you that the defendant does not have to take the stand. He can reserve the privilege to himself for any undisclosed reason to refuse to take the stand. ...") did not amount to an indication of his disapproval of the constitutional privilege. Three concurring Justices wrote a separate opinion cautioning the trial court that such a charge was improper as a "judicial hint that his failure to speak may indicate guilt." *Commonwealth v. Thomas*, 239 A.2d 354, 4 CLB 258.

**§44.18. Conduct of trial judge —  
Prejudicial comments**

**Oklahoma** In a case where the defendant's credibility as a witness is crucial to the outcome, it is reversible error for the judge to characterize defense counsel's attitude as "contemptuous" in the presence of the jury. Even if counsel deserves rebuke, it must be administered in

the jury's absence in order to avoid any risk that the client's position will be weakened by association. *Dale v. State*, 441 P.2d 476, 4 CLB 422.

**Texas** In an attempt to have a witness demonstrate the location of bullet holes in the wall at the scene of the assault, defense counsel suggested that pencil marks on the courtroom wall be made. The court's refusal to allow this coupled with the admonition, "No, you wouldn't mark it with a pencil unless you want to go to jail. ... Let's quit killing time to get along ..." did not deprive the defendant of a fair trial. *Carter v. State*, 420 S.W.2d 418, 4 CLB 53.

**§44.35. Conduct of trial judge —  
Exclusion of witnesses from  
courtroom**

**Court of Appeals, 9th Cir.** Trial court's refusal to allow testimony of witness who remained in courtroom in violation of sequestration order was an abuse of discretion in the absence of any showing that the party calling her had a part in the violation or sought to profit from it. *Taylor v. United States*, 388 F.2d 786, 4 CLB 47.

**§44.72. — Granting severance during  
course of trial**

**Court of Appeals, 2nd Cir.** Second Circuit, intimating that government used poor judgment in proceeding on conspiracy count in multi-defendant and multi-count indictment because of an obvious want of proof, holds that following the dismissal of the conspiracy count at the conclusion of the government's case, minor defendants were prejudiced by the joinder of the remaining counts, and their motions for severances should have been granted. *United States v. Branker*, 395 F.2d 881, 4 CLB 244.

**§44.73. — Allowing questions from the  
jury**

**Indiana** "The practice of permitting jurors to propound questions should not be encouraged by the trial court, but it should not be forbidden by preliminary instruc-

tion. As a question is propounded during the course of a trial, it is within the sound discretion of the trial court to make a determination as to whether the question is for the evident purpose of discovering the truth and whether such question is proper." *Carter v. State*, 234 N.E.2d 650, 4 CLB 256.

**§44.75. Conduct of trial judge —  
Restriction on right of  
cross-examination**

**Court of Appeals, 5th Cir.** Trial court's restriction of counsel's cross-examination of handwriting expert with respect to expert's qualifications and possible prior inconsistent opinion was reversible error. *McConnell v. United States*, 393 F.2d 404, 4 CLB 177.

**Alabama** The trial court committed reversible error when sustaining the state's objection to defense counsel's questions regarding the officers' feelings toward the defendant. *Maples v. State*, 214 So.2d 700, 4 CLB 596.

**§45.00. Conduct of prosecutor —  
in general**

**Tennessee** "[A] conditional employment by accused, or a mere discussion of a proposed employment, without any confidential communication having passed . . . does not disqualify" the lawyer who was approached but not retained as defense counsel from being a special prosecutor. Where accused testified that he had discussed entire case with prosecutor and prosecutor stated that only a fee was discussed, trial court's resolution of conflict in testimony in favor of prosecutor was not an abuse of discretion. *Autry v. State*, 430 S.W.2d 808, 4 CLB 538.

**§45.05. Conduct of prosecutor —  
Prosecutor's discretion to  
prosecute**

**New Mexico** Prosecutorial discretion permits a district attorney to enforce an habitual offender statute only against defendants whose prior crimes were committed in the same state, even though the statute provides for mandatory application against both in-state and out-of-state prior

offenders. The equal protection of the law is not denied by such a policy. *State v. Baldonado*, 441 P.2d 215, 4 CLB 378.

**§45.10. Conduct of prosecutor —  
Comments made during opening  
statement**

**Alabama** Prosecutor's statement in opening to the jury that "the defendant, along with three other boys, who have already pleaded guilty, were indicted by . . . the Grand Jury" constitutes prejudicial error, since their pleas of guilty are not evidence of the defendant's participation in the crime charged. *Knowles v. State*, 204 So.2d 506, 4 CLB 132.

**Washington** The prosecutor's promise in his opening statement, that the state would introduce evidence of prior similar acts in which the defendants were involved, was not prejudicial error even though no evidence of prior similar acts was subsequently admitted. The prosecutor acted on the good faith belief that he would be able to introduce this evidence, but was prevented from so doing by the trial court. *State v. Parker*, 444 P.2d 796, 4 CLB 538.

**§45.20. Conduct of prosecutor —  
Comments made during  
summation — in general**

**Court of Appeals, District of Columbia D.C.** Circuit deplores widespread practice by both prosecutors and defense counsel of injecting their personal beliefs into their final arguments to the jury and warns of disciplinary sanctions for future violations. *Harris v. United States*, 402 F.2d 656, 4 CLB 498.

**Court of Appeals, 2nd Cir.** Prosecutor's statement in summation that defendant was "doubly vicious because he demanded his full constitutional rights here knowing full well he was guilty" combined with trial judge's charge that jury should acquit defendant if "it is more likely that he is innocent than guilty" required a new trial. *United States v. Hughes*, 398 F.2d 535, 4 CLB 116.

**Georgia** Prosecutor's comment in summation at defendant's murder trial, com-

paring the defendant to the Viet Cong and stating that the "possibility of his some day returning to society would be a greater danger than the threat of world communism and the Viet Cong" does not require a reversal where "the language objected to was a permissible inference from the evidence and its logic was for the jury to determine." [The State's evidence was that the defendant had repeatedly stabbed his defenseless wife as she attempted to crawl away.] *Martin v. State*, 157 S.E.2d 458, 4 CLB 69.

**Oklahoma** Prosecutor's comment in his closing argument when comparing defendant to a "rabid animal" did not deprive the defendant of his right to a fair and impartial trial. *Ramos v. State*, 445 P.2d 807, 4 CLB 597.

**Texas** In prosecution for unlawful possession of heroin, prosecutor can argue to jury that defendant possessed \$840.00 worth of heroin either to use it or sell it on theory that this is a reasonable deduction from the evidence; he may even tell the jury "that this is the sort of thing that can even get into the hands of school children," provided he does not directly tell the jury that defendant wanted to sell the heroin to school children. *Jiminez v. State*, 421 S.W.2d 910, 4 CLB 141.

**Texas** Prosecutor's comment in his argument to the jury on the issue of punishment that "Society demands that the defendant be punished" was merely a plea for law enforcement and did not offend state rule against informing jury that the people of the community want an accused convicted. *Perbetsky v. State*, 429 S.W.2d 471, 4 CLB 427.

**§45.22. — Comment as to punishment**

**Indiana** Prosecutor's improper comment regarding possibility of defendant's speedy parole if convicted of lesser charge constitutes reversible error. *Rowe v. State*, 237 N.E.2d 576, 4 CLB 484.

**§45.25. Conduct of prosecutor —  
Comment on defendant's  
failure to testify**

**Court of Appeals, 2nd Cir.** Pro se de-

fendant who did not formally take the stand in his own behalf could not complain of prosecutor's statement in summation that he could not comment on the defendant's failure to testify, where defendant engaged in widespread pro se argument which amounted to testifying and he himself, in his summation, called jury's attention to his failure to take the stand. *United States ex rel. Miller v. Follette*, 397 F.2d 363, 4 CLB 497.

**Court of Appeals, 5th Cir.** Remark of prosecutor in summing up that "G. L. Samuels [the defendant] does not want to talk about the facts" was directed toward trial strategy of defense counsel in relying on "supposition, innuendo and insinuation" and not on defendant's failure to take the stand; in any case, it was not plain error and, therefore, the failure of defense counsel to make timely objection — he objected at the conclusion of the closing argument long after the remark was made — waived the objection. *Samuels v. United States*, 398 F.2d 964, 4 CLB 531.

**Illinois** Prosecutor's comment implying that defendant could not afford to allow his gun to be located and examined by ballistics expert did not constitute improper comment on defendant's failure to testify. *People v. Williams*, 240 N.E.2d 645, 4 CLB 607.

**Missouri** Statement by the prosecutor that the State's evidence was "uncontradicted and undenied" was not a comment on the appellant's failure to take the stand where the jury "conceivably" could have concluded that others beside appellant could have testified but did not. *State v. Hampton*, 430 S.W.2d 160, 4 CLB 547.

**§45.30. Conduct of prosecutor —  
Comment on failure of defense  
to call certain witnesses**

**Iowa** Where prosecutor repeatedly inferred (a) that defendant's wife would give damaging testimony if not for the marital privilege; (b) that defendant had married her for the purpose of precluding her testimony; and (c) that the jury should draw an adverse inference from invoca-

tion of privilege, the conviction was reversed. *State v. Levy*, 160 N.W.2d 460, 4 CLB 435.

**§45.36. — Reference to matter not in evidence**

**Court of Appeals, District of Columbia** Prosecutor's argument to jury incorporating facts which had been excluded from evidence on defense counsel's objection necessitated reversal of conviction. *Garris v. United States*, 390 F.2d 862, 4 CLB 123.

**Kansas** Prosecutor's reference during summation to defense witness' contradictory statement, not part of the record evidence, held to be reversible error. *State v. Gauger*, 438 P.2d 455, 4 CLB 325.

**§45.37. — Eliciting inadmissible evidence**

**Michigan** A police officer's reply in answer to a prosecution question, that the defendant told him he had just gotten out of prison was prejudicial error. The prosecutor was charged with knowledge of the response because he had gotten the same response in answer to the same question at a pre-trial hearing. *People v. Camel*, 160 N.W.2d 790, 4 CLB 536.

**§45.40. Conduct of prosecutor — Calling witness who prosecutor knows will claim Fifth Amendment privilege (See also §51.18.)**

**Michigan** When A and B are on trial together, and B's confession, implicating A, has been received in evidence, and B then pleads guilty, it is no error to permit the prosecution to call B as a witness against A, even if B declines to testify for the express reason that he is afraid of A. *People v. Shirk*, 159 N.W.2d 162, 4 CLB 427.

**Washington** It is error for the prosecutor to call as a witness the defendant's accomplice when he knows the witness has a valid claim of privilege against self-incrimination and knows he intends to invoke it. The error is reversible if the prosecutor then asks this witness a series of questions (all unanswered) which set forth the prosecution's whole theory of

the case to the jury. *State v. Nelson*, 432 P.2d 857, 4 CLB 68.

**Wisconsin** Reversible error is not shown by the prosecution's action in calling as a witness the defendant's alleged accomplice who faced a separate trial on identical charges and who has stated that he will claim his privilege against self-incrimination in the presence of the jury, so long as "critical weight" is not added to the prosecution's case by his claim of privilege. *Price v. State*, 154 N.W.2d 222, 4 CLB 136.

**§45.50. Conduct of prosecutor — Suppression of evidence**

**Court of Appeals, 5th Cir.** Where rape defendant is dark-skinned Negro, prosecutor's failure to disclose to defense counsel that sole eyewitness believed attacker to be light-skinned was violation of due process. And where deputy sheriff informed defense counsel that witness could not identify attacker, constitutional error was not avoided by prosecution supplying defense counsel with witness' name and address and making her available at trial. *Jackson v. Wainwright*, 390 F.2d 288, 4 CLB 124.

**Illinois** Prosecutor's deliberate failure to disclose material exculpatory evidence to defense requires new trial. *People v. Murdock*, 237 N.E.2d 442, 4 CLB 484.

**§46.00. Sufficiency of evidence — Individual crimes**

**Illinois** Victim's "inherently improbable" testimony of forcible rape held insufficient to support conviction. *People v. Hayes*, 236 N.E.2d 273, 4 CLB 371.

**Massachusetts** Conviction of passive defendant proper where reasonable inferences permitted jury to hold him responsible as principal with active co-defendant. *Commonwealth v. Medeiros*, 236 N.E.2d 642, 4 CLB 365.

**New York** Speeding conviction resting wholly on the testimony of qualified police officer estimating defendant's rate of speed is proper. *People v. Olsen*, 22 N.Y.2d 230, 4 CLB 381.

**North Carolina** Mere fact that defendant drove car in which co-defendant left scene of robbery does not sustain finding that defendant was an accomplice. *State v. Aycoth*, 157 S.E.2d 655, 4 CLB 59.

**§46.20. Sufficiency of evidence — Requirement of corroboration — accomplice testimony**

**Nevada** An informer who was recruited by the police to buy narcotics from defendant could not be considered an accomplice, and therefore, the conviction of defendant could be predicated on the informer's uncorroborated testimony. *Tellis v. State*, 445 P.2d 938, 4 CLB 599.

**Texas** Trial court committed reversible error by failing to instruct jury that where state introduced defendant's testimony in an earlier case to corroborate accomplice's testimony and where previous testimony was exculpatory, the state had to disprove the exculpatory statement beyond a reasonable doubt or the defendant had to be acquitted. *McIntyre v. State*, 431 S.W.2d 5, 4 CLB 536.

**§46.40. Sufficiency of evidence — Requirement of corroboration — sex crimes**

**New York** When a complainant testifies without corroboration to a completed act of rape, there may not be a conviction for such rape or for any assaultive act which is factually part of the alleged rape. *People v. Radunovic*, 21 N.Y.2d 186, 4 CLB 74.

**§46.80. Necessity of laying foundation**

**Maryland** Evidence that defendant was arrested after being tracked by a German Shepherd was admissible once a proper foundation had been laid establishing (1) the qualifications and training of the dog and his handler, and (2) the fact that the trail was recent and the area of the crime had been sealed off so that only the scent of the perpetrator of the crime would be present. *Terrell v. State*, 239 A.2d 128, 4 CLB 255.

**§47.05. Parol evidence rule**

**Court of Appeals, 5th Cir.** Parol evidence

rule does not bar use of oral statements taken in compliance with *Miranda* where subsequent written statements containing same material were taken in violation of *Miranda*. "The purpose of the *Miranda* principle is to guarantee the accused knowledge of basic constitutional entitlements, and the giving of required warnings communicating such knowledge is unrelated to consensual contractual problems of commercial paper to which the parol evidence rule relates." *Sanders v. United States*, 396 F.2d 221, 4 CLB 415.

**§47.10. Character and reputation evidence**

**Indiana** Introduction of irrelevant evidence that defendant was a homosexual was so prejudicial as to require a new trial. *Raines v. State*, 240 N.E.2d 819, 4 CLB 596.

**§47.20. Circumstantial evidence**

**California** Supreme Court of California rejects prosecutor's use of "probabilities" to show likelihood that defendants committed crime. *People v. Collins*, 438 P.2d 33, 4 CLB 249.

**§47.22. Circumstantial evidence — Flight**

**Arizona** Mere departure from scene of crime is insufficient to warrant jury instruction on flight. *State v. Rodgers*, 442 P.2d 840, 4 CLB 425.

**§47.24. Circumstantial evidence — Intent**

**New Jersey** Defendant's intent to assault his intended victim sufficient to support assault conviction for accidental wounding of another. *State v. Humphreys*, 240 A.2d 680, 4 CLB 373.

**§47.27. — Consciousness of guilt**

**New Jersey** Visit to grave of arson victim is evidence of consciousness of guilt. *State v. Mills*, 240 A.2d 1, 4 CLB 315.

**§47.30. Hearsay evidence**

**Illinois** Cross-examination of accomplice on contents of his out-of-court statements which incriminated defendant was prejudicial hearsay. *People v. McKee*, 235 N.E.2d 625, 4 CLB 316.

**§47.35. Hearsay evidence — Use of prior testimony**

**United States Supreme Court** Defendant's testimony on motion to suppress may not be used against him at trial on issue of guilt. *Simmons v. United States*, 390 U.S. 377, 4 CLB 172.

**Illinois** Fact that witness has been adjudged legally incompetent and committed to state mental institution does not by itself justify state in using his prior testimony at retrial. Test is whether witness is presently competent as a witness and that determination can only be made by trial court at time of trial. *People v. Cox*, 230 N.E.2d 900, 4 CLB 77.

**Maryland** Police officer's testimony that missing witness had sent a check to his mother with an Oklahoma address and that he had spoken to the witness' former employer and friends who told him that the witness was stationed at Fort Sill, Oklahoma constituted diligent effort so as to permit the prosecution, at defendant's retrial, to introduce, under former testimony exception to hearsay rule, witness' testimony at first trial. *Britton v. State*, 234 A.2d 274, 4 CLB 62.

**§47.38. — Withdrawn guilty pleas and related admissions**

**Arizona** The Supreme Court of Arizona abandons its earlier rule as stated in *Rascon v. State*, 47 Ariz. 501, 57 P.2d 304 (1936), and holds that when a plea of guilty is withdrawn and the defendant goes to trial, that plea may not be introduced in evidence. A plea of guilty is not realistically comparable to an admission or confession, because one may decide so to plead without confessing guilt. In addition, the withdrawal of a plea is usually permitted in cases of possible misunderstanding, coercion, or other injustice in its initial entry, and it would be wholly inconsistent with that fact to use a withdrawn plea in any manner. *State v. Wright*, 436 P.2d 601, 4 CLB 187.

**California** A defendant's admission of guilt to a probation officer following a plea of guilty (which was subsequently

withdrawn) may be used at trial if uttered upon the advice of counsel. *People v. Alesi*, 434 P.2d 360, 4 CLB 129.

**Illinois** Defendant's station house offer to plead guilty to lesser charge held inadmissible at trial. *People v. Carter*, 232 N.E.2d 692, 4 CLB 129.

**§47.39. — Prior inconsistent statements as substantive evidence**

**Court of Appeals, 3rd Cir.** Declining to say whether prior inconsistent statements may, under some circumstances, be used at trial as substantive evidence of guilt (See *United States v. De Sisto*, 329 F.2d 929 (2 Cir. 1964)), Third Circuit holds that prior inconsistent statement given in connection with witness' sentencing, not under oath, and not subject to cross-examination, may not be so used. *United States v. Schwartz*, 390 F.2d 1, 4 CLB 114.

**California** Section 1235 of California's new Evidence Code, permitting the use of prior inconsistent statements of a witness as proof of the content therein, is unconstitutional as applied to criminal cases, because it deprives the defendant of the right to conduct a contemporaneous cross-examination with reference to the out-of-court statement so used. *People v. Johnson*, 441 P.2d 111, 4 CLB 372.

**§47.42. — Business records exception**

**Washington** The business records exception to the hearsay rule does not permit the introduction of hospital records containing statements made to the recording physician by a third party, particularly if the third party is the complainant and the statements give the jury enough information to convict. *State v. White*, 433 P.2d 682, 4 CLB 62.

**§47.45. — Declarations against interest**

**Court of Appeals, 9th Cir.** Ninth Circuit, assuming *arguendo* that statements against a penal interest are valid exceptions to the hearsay rule, rules that trial judge did not err in refusing to allow such a statement in evidence where it was not shown that hearsay declarant was unavailable as a

witness. *Jones v. United States*, 400 F.2d 134, 4 CLB 414.

**§47.70. — Presumptions and inferences**  
(See also §23.00)

**Court of Appeals, 8th Cir.** Defendant's presence in a stolen car with knowledge that car was stolen held insufficient to convict him either of transporting the car or aiding and abetting in its transportation in interstate commerce. *Baker v. United States*, 395 F.2d 368, 4 CLB 416.

**Indiana** Proof that appellant was driving in a straight course on the proper side of road, within the speed limit, and able to stop within 106 feet of impact held sufficient to overcome presumption that driver with .15 per cent blood alcohol is under influence of intoxicant sufficiently to lessen

**§47.80. — Res gestae and spontaneous declarations**

**Oklahoma** In a prosecution for rape where the defense of consent was interposed, it was not error to admit into evidence a towel which defendant allegedly used to clean himself with after committing the crime and then used to gag the victim after having bound her since the binding and gagging were part of the *res gestae*. *Ramos v. State*, 445 P.2d 807, 4 CLB 597.

**Pennsylvania** Victim's declaration made nearly an hour after shooting admissible as a spontaneous utterance. *Commonwealth v. Edwards*, 244 A.2d 683, 4 CLB 537.

**Washington** Because the complainant was too young to be a competent witness, it was proper to permit the mother of the complainant to testify that the child made the complaints on two separate occasions. *State v. Lounsbury*, 445 P.2d 1017, 4 CLB 609.

**Wisconsin** A hearsay statement of a police officer at the scene of defendant's arrest is not admissible as the admission of a party. While it may be admissible as part of the *res gestae*, it is subject to exclusion by the trial judge on the ground that it is untrustworthy or of insignificant probative

value. *State v. Smith*, 153 N.W.2d 538, 4 CLB 63.

**§48.00. Identification evidence — Fingerprints**

**District of Columbia** Conviction for attempted housebreaking is reversed and complaints dismissed where the sole evidence is the existence of the defendant's fingerprints on the outer portion of the glass door, accessible to the public, through which the entry was forced. The Government must negate "at least some of the reasonable inferences consistent with the defendant's innocence," and despite the fact that the defendant's attempt to explain the prints was highly suspect and totally discredited by rebuttal witnesses, this does not supply "any facts necessary to prove the Government's case." *Townslley v. United States*, 236 A.2d 63, 4 CLB 131-132.

**Indiana** Conviction proper where fingerprint evidence identifies defendant as perpetrator. *Groce v. State*, 236 N.E.2d 597, 4 CLB 373.

**Maryland** Defendant's fingerprints found at entry point of burglary coupled with other circumstances held sufficient to support conviction. *Lawless v. State*, 241 A.2d 155, 4 CLB 423.

**Maryland** Evidence that defendant's fingerprints corresponded to those found on getaway car insufficient to support conviction, without proof that they were impressed at the time of the crime. *Gray v. State*, 241 A.2d 725, 4 CLB 424.

**§48.40. Testimony of prior identification**  
(See also §25.00., et seq.)

**Massachusetts** Testimony of police officer that "while performing his duties he selected a photograph" which resembled sketch of killer was not improper reference to defendant's previous record. *Commonwealth v. Nassar*, 237 N.E.2d 39, 4 CLB 425.

**§48.70. Identification evidence — Voice print**

**New Jersey** Based upon a full hearing ordered by an appellate court on the issue of whether the scientific method of taking

voice prints had attained that degree of reliability as would warrant the admissibility of the results of those tests, New Jersey Superior Court rules that such evidence is inadmissible, since the evidence at the hearing "indicates, not that it is not accurate and reliable, but rather that it is just too early to tell and at this time lacks the required scientific acceptance." *State v. Cary*, 239 A.2d 680, 4 CLB 256.

**§50.00. Proof of other crimes to show motive, intent, etc.**

**California.** Proof of other crimes is generally inadmissible when it is offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged. However, when a primary issue of fact is whether or not defendant was the perpetrator of crime charged, evidence of other similar crimes is admissible if it discloses a distinctive *modus operandi* common to both the other crimes and the crime charged. Thus, in a criminal prosecution for robberies, similarities between prior robbery offenses and the robberies charged, such as the time of the robbery, the method of holding the employees at bay, the method of entry into the places robbed, and the fact that the perpetrators of the robbery wore handkerchiefs over their faces did not invest the prior crimes' evidence with significant probative value. But when these factors were coupled with the presence of the same co-defendant, the evidence of the other crimes was then vested with sufficient probative value which outweighed any prejudicial effect. *People v. Haston*, 444 P.2d 91, 4 CLB 474.

**California** In a prosecution for a sexual crime, evidence of other similar offenses committed by the defendant with the complaining witness is ordinarily admissible as probative of his lewd disposition or intent toward that person. This is *not* true, however, when the proposed evidence of other similar offenses consists of the uncorroborated testimony of the complaining witness. The reason for this exception is that where the central factual

issue is the relative credibility of the complainant and the defendant, nothing is added by the complainant's attempted *self*-corroboration. *People v. Stanley*, 433 P.2d 913, 4 CLB 132.

**Indiana** Where consent was the sole issue in prosecution for rape, it was reversible error for trial court to admit evidence of uncharged rape of another woman allegedly occurring several weeks prior to incident which formed basis of indictment. *Meeks v. State*, 234 N.E.2d 629, 4 CLB 256.

**N.Y. App. Div.** Where the defendant was being tried on a robbery charge, the admission of testimony as to another robbery involving the same complainant but on which the defendant had been granted a severance constituted prejudicial error. *People v. Wiggins*, 294 N.Y.S. 2d 2, 4 CLB 598.

**§50.10. Out of court experiments**

**Pennsylvania** Blood type comparison evidence improperly received at trial requires reversal of dynamiting conviction. *Commonwealth v. Mussoline*, 240 A.2d 549, 4 CLB 370.

**§50.20. Opinion evidence  
(See also §51.20.)**

**Illinois** Expert testimony based on experiment not substantially duplicating the actual events resulted in reversible error. *Miller v. State*, 236 N.E.2d 585, 4 CLB 370.

**§50.22. Proof of value**

**Court of Appeals, 8th Cir.** 2194 blank Postal Money Orders have a value in excess of \$100. Value may mean the amount the goods may bring to a thief. *Churdler v. United States*, 387 F.2d 825, 4 CLB 47.

**§50.30. Reasonable doubt**

**Illinois** Rape-kidnapping conviction sustained despite police testimony that victim failed to utilize opportunity to disclose that she was being held captive. *People v. Lee*, 238 N.E.2d 63, 4 CLB 481.

**§51.00. Competency**

**Alaska** Where prosecution witness took the standard oath to tell the truth and then disclaimed his belief in God, he was nonetheless a competent witness. There must be a showing that "the witness was unaware of his serious obligation to relate the truth." *Flores v. State*, 443 P.2d 73, 4 CLB 500.

**Missouri** Missouri Supreme Court refuses to declare that a heroin addict's testimony concerning events surrounding a homicide is incompetent and inadmissible simply because he admitted taking three shots of heroin within a 12 hour period prior to the homicide, the last injection occurring fifteen minutes before. The court noted that "there [is] no consensus of medical opinion to the effect that morphine addicts were usually abnormally untruthful in matters not connected with their addiction." *State v. Booth*, 423 S.W.2d 820, 4 CLB 260.

**§51.10. Privileged communications**

**Court of Appeals, 8th Cir.** Defendant husband charged with sending a threatening letter to his wife (he threatened to kill her with a shotgun) in violation of 18 U.S.C. 876 may not keep his wife from testifying to the crime by asserting the spousal privilege. The privilege does not apply where the wife is the victim of the criminal act with which the husband is charged. Further, the communications were not confidential and were not intended to be so. The wife had difficulty reading, and at the husband's suggestion, the written communications were read to her by her stepfather. *Grulkey v. United States*, 394 F.2d 244, 4 CLB 248.

**Maryland** Attorney's disclosure of client's name is not breach of attorney-client privilege. *Morris v. State*, 241 A.2d 559, 4 CLB 487.

**Oregon** The freedom of the press does not vouchsafe a newspaper reporter the right to refuse to divulge the identities of persons who have provided him with information concerning crimes; and the creation of a nonconstitutional privilege

under such circumstances is best left to the legislative power. *State v. Buchanan*, 436 P.2d 729, 4 CLB 197.

**§51.18. Witness' assertion of privilege against self-incrimination — effect (See also §36.00.)**

**New York** Trial court committed reversible error in permitting co-defendant in joint trial to call defendant to witness stand requiring him to assert his privilege against self-incrimination before the jury. *People v. Owens*, 22 N.Y.2d 93, 4 CLB 323.

**New York** Prosecutor's action in calling witness to the stand is held to be reversible error where witness is mentioned in each of the defendants' confessions as a participant in the crime and the witness asserts his privilege against self-incrimination. Trial judge's instruction that jury was to disregard witness' appearance did not cure error. *People v. Pollock*, 21 N.Y.2d 206, 4 CLB 67.

**§51.25. Informants — Disclosure of identity**

**California** Where a confidential informant is relied upon to establish probable cause for a search warrant, and that informant may also be a material witness on the issue of guilt, his identity must be disclosed even if he is neither a participant in nor an eyewitness to the alleged crime. *People v. Garcia*, 434 P.2d 366, 4 CLB 130.

**§51.55. Refreshing witness' recollection**

**Court of Appeals, 2nd Cir.** Use of statement obtained in violation of *Miranda* for the purpose of attempting to refresh witness' recollection on cross-examination did not warrant reversal of conviction where statement was not identified, read, or otherwise independently presented to jury and where witness testified his recollection was not refreshed. *United States v. Baratta*, 397 F.2d 215, 4 CLB 354.

**§52.25. — Right to witness' address**

**United States Supreme Court** Sixth Amendment requires that defense counsel be permitted to ascertain prosecution wit-

ness' name and address upon cross-examination. Federal decisional law with respect to Sixth Amendment's confrontation clause must be observed as minimal standards in state prosecutions. *Smith v. Illinois*, 390 U.S. 129, 4 CLB 106.

**§52.30. Cross-examination —**

**Impeachment by prior conviction**

**Alabama** In a trial for manslaughter caused by an automobile, it was prejudicial error to cross-examine the defendant as to whether he had a driver's license, there being no causal connection between the failure to have a license and the manner of driving that caused the death.

It was also prejudicial error to allow witnesses to testify that the defendant was intoxicated fifteen minutes after the accident where the state failed to preclude the possibility that the defendant drank after the accident. *Montgomery v. State*, 203 So.2d 695, 4 CLB 76.

**Missouri** Attempting to impeach a defendant upon the basis of a prior criminal conviction from which an appeal is still pending is improper. *State v. Blevins*, 425 S.W.2d 155, 4 CLB 261.

**§52.32. — Procedure**

**Maryland** Maryland appellate court suggests procedures to be followed in connection with a prosecutor's attempt to impeach a defendant by means of a prior conviction. *Woodell v. State*, 234 A.2d 890, 4 CLB 76.

**Washington** The Supreme Court of Washington holds that where, on cross-examination, a defendant denies a prior conviction, the prosecutor's further attempts to impeach him with the asserted conviction is improper where the prosecutor refuses or is unable to prove it. The court, nevertheless, declines to reverse because of defendant's failure to make a timely objection. *State v. Beard*, 444 P.2d 651, 4 CLB 488.

**§52.35. Cross-examination — Nature of conviction**

**Court of Appeals, 3rd Cir.** Instruction to a jury that "ordinarily, it is assumed

that a witness will speak the truth . . ." is not by itself reversible error where defendant testified in his own behalf and called other witnesses to support his defense. However, conviction is reversed where, in addition, trial court failed to give accomplice charge with regard to testimony of principal government witness, and erroneously allowed an alibi witness for defendant to be impeached by a misdemeanor conviction for a crime not involving moral turpitude. *United States v. Evans*, 398 F.2d 159, 4 CLB 359.

**Illinois** Court-martial conviction held not to be so lacking in constitutional safeguards as to bar its use to impeach defendant's credibility. *People v. Helm*, 237 N.E.2d 433, 4 CLB 474-475.

**§52.45. — Rehabilitation by prior consistent statements**

**Court of Appeals, 8th Cir.** Eighth Circuit, disapproving "rigid rules of evidence grounded merely in tradition which strip the trial court of discretion in admitting evidence before the jury," upholds trial court's action in allowing use of prior consistent statements to rehabilitate witness impeached by prior inconsistent statements even though prior consistent statements were given later in time and did not pre-date a motive to fabricate. *Hanger v. United States*, 398 F.2d 91, 4 CLB 365.

**§52.50. Cross-examination —**

**Impeachment for bias or motive**

**District of Columbia** Trial court's ruling that defense counsel was not to cross-examine complainant in larceny and assault prosecution about any homosexual relationship between defendant and complainant was error, since the existence of such a relationship was probative to show a possible motive of the complainant in lying about the alleged larceny and assault. *Thompkins v. United States*, 236 A.2d 443, 4 CLB 142.

**§52.55. — Impeachment as to mental condition**

**California** In a prosecution for incest, the trial court abused its discretion in

refusing to allow defendant to present psychiatric evidence relating to the mental stability of the fourteen year old complainant where the court, upon defendant's motion, had earlier ordered the complainant to undergo a psychiatric examination. *People v. Russell*, 443 P.2d 794, 4 CLB 487.

**§52.90. — Use of unconstitutionally obtained evidence to impeach**

**Court of Appeals, District of Columbia** Court of Appeals for D.C. Circuit holds that statements taken in violation of rules set forth in *Miranda* may not be used at trial for purposes of impeachment. "The teaching of *Walder*, however valid in other contexts, appears irrelevant when a *Miranda* problem is presented." *Suggs v. United States*, 391 F.2d 971, 4 CLB 243.

**Court of Appeals, District of Columbia** Statements elicited in violation of *Miranda* may not even be used to impeach defendant on a collateral issue. *Proctor v. United States*, 404 F.2d 819, 4 CLB 491.

**Court of Appeals, 9th Cir.** Although defendant's interrogation was conducted in violation of *Miranda*, his testimony on cross-examination at the trial that he told certain things to the interrogating agents may be subsequently impeached by rebuttal testimony of the agents that he did not. *Martin v. United States*, 400 F.2d 149, 4 CLB 415.

**Court of Appeals, 9th Cir.** "If statements are obtained from a defendant in violation of the *Miranda* rules and if the interrogation relates to an offense for which the defendant is ultimately brought to trial, those statements as well as any portion thereof, may not be used against the defendant at trial for any purpose whatsoever." *Gröshart v. United States*, 392 F.2d 172, 4 CLB 176.

**New York** A statement taken in violation of *Miranda*, which is exculpatory on its face, may not be used to prove the falsity of an alibi or to impeach the defendant as a witness. *People v. Shivers*, 21 N.Y.2d 118, 4 CLB 56.

**New York Appellate Division** Where statements were taken in violation of *Miranda*, the prosecutor could not elicit denial of incriminating facts on cross-examination and then impeach defendant's testimony by reference to such statements. *People v. Schwartz*, 292 N.Y.S.2d 518, 4 CLB 471.

**Pennsylvania** Statements obtained in violation of *Miranda* are inadmissible for impeachment purposes. *Commonwealth v. Miller*, 241 A.2d 346, 4 CLB 434.

**Pennsylvania** Statement obtained in violation of *Escobedo v. Illinois*, 378 U.S. 478, may not be used for any purpose at trial, including impeachment. Harmless error rule held applicable to statements taken in violation of *Escobedo-Miranda* decisions. *Commonwealth v. Padgett*, 237 A.2d 209, 4 CLB 185.

**Pennsylvania** Where defendant does not "open the door," use of statement taken in violation of *Miranda* to impeach the defendant upon cross-examination constitutes reversible error. *Commonwealth v. Burkett*, 235 A.2d 161, 4 CLB 56.

**§53.00. — Impeachment of one's own witness**

**Pennsylvania** After the prosecutor informed the trial court that the defendant's girl friend intended to repudiate her signed statement in which she admitted that the defendant had told her of his complicity in the robbery, the court called her as its own witness and had her statement read into evidence. Thereafter defense counsel cross-examined her and she explained that her statement was coerced. The prosecutor was then permitted to call a rebuttal witness who testified that the girl friend had told her that the defendant admitted his complicity in the crime. Such a procedure is reversible error since it amounts to an impermissible impeachment of one's own witness. The trial judge's ruling was doubly prejudicial because, by his reading of the statement to the jury, "the jury could not have helped but view this as the statements receiving the judge's imprimatur." *Commonwealth v. Crews*, 239 A.2d 350, 4 CLB 255.

**§54.20. Double jeopardy — in general**  
**Maryland** Defendant's conviction under an indictment charging "assault with intent to kill" did not preclude his being tried upon a second indictment charging "assault with intent to murder." The first verdict was improper, there being no such crime under Maryland law. "Accordingly, the second trial did not violate the double jeopardy guarantee; the first trial was a 'nullity' as the appellant was found guilty of a crime which was not known to the law of the State. . . ." *Jenkins v. State*, 238 A.2d 922, 4 CLB 255.

**§54.25. Double jeopardy — Separate and distinct offenses**

**Court of Appeals, 8th Cir.** Eighth Circuit holds itself bound by *Hoag v. New Jersey*, 356 U.S. 464 (1958) and *Ciucci v. Illinois*, 356 U.S. 571 (1958) and affirms the denial of a writ of habeas corpus on a double jeopardy claim based upon a state conviction for robbing one of several men at a private poker game after an acquittal of the robbery of another. *Ashe v. Swenson*, 399 F.2d 40, 4 CLB 529.

**Delaware** Double jeopardy provision not violated by proof of some acts which constituted previous burglary conviction in order to establish felony component of felony murder charge. *Jenkins v. State*, 240 A.2d 146, 4 CLB 314.

**§54.30. Double jeopardy — Dual sovereignty doctrine**

**Florida** Defendant's convictions for (a) destruction of city property and breach of peace in municipal court and (b) grand larceny in the state court, all arising from the theft of a City Hall mural, did not constitute double jeopardy. Dual sovereignty theory applied to separate city and state prosecutions. *Waller v. State*, 213 So.2d 623, 4 CLB 473.

**Maine** Double jeopardy no bar to State prosecution following federal conviction for same bank robbery. *State v. Castonguay*, 240 A.2d 747, 4 CLB 369.

**§54.40. Double jeopardy — Implied acquittal**

**Arizona** Where the defendant had ob-

tained a new trial after an appeal from a jury verdict convicting him of murder in the second degree but specifically acquitting him of murder in the first degree, voluntary manslaughter, and involuntary manslaughter, the prohibition against double jeopardy precluded the state from re-prosecuting the defendant for the crimes for which he had been specifically acquitted. The Supreme Court of Arizona declared, however, that double jeopardy would attach only in these cases where the jury's verdict specifically stated "not guilty" as to certain crimes and not to cases where the jury only impliedly acquits the defendant of certain charges. *State v. Intogna*, 445 P.2d 431, 4 CLB 535.

**Indiana** Double jeopardy no bar to death penalty on retrial following reversal of first conviction even though first jury imposed life imprisonment. *Layton v. State*, 240 N.E.2d 489, 4 CLB 535.

**Missouri** Double jeopardy guarantee is not violated where, following the reversal of his conviction for second degree murder resulting after trial on a charge of first degree murder, the defendant is tried again for murder in the first degree. *State v. Crane*, 420 S.W.2d 309, 4 CLB 58.

**§54.60. Double jeopardy — Point at which jeopardy attaches**

**Florida** Trial court's discharge of the jury without the defendant's consent after the state's first witness had been called to the stand but before any testimony was taken (when it was discovered that the defendant had never been arraigned) caused jeopardy to attach, thereby prohibiting a second trial on the charge. *State v. Lanier*, 205 So.2d 671, 4 CLB 188.

**§54.62. Double jeopardy — Reason for granting mistrial**

**Court of Appeals, District of Columbia** Retrial of defendant after trial court granted mistrial because of defense counsel's statement to the jury that the two previous trials had resulted in mistrials was barred by double jeopardy clause. D.C. Circuit suggests cautionary instructions be given at the outset of retrials to

avoid possible prejudice stemming from references to prior trial by either or both parties. *Carsey v. United States*, 392 F.2d 810, 4 CLB 39.

**Florida** Trial court's discharge of jury and declaration of a mistrial due to illness of alternate juror's wife does not give rise to defense of double jeopardy; moreover defense counsel's statement to the prosecuting attorney that "you might even move for a mistrial" precludes the defendant from raising the defense of double jeopardy. *Adkins v. State*, 205 So.2d 530, 4 CLB 189.

**§54.63. Ex post facto**

**Oklahoma** Sentencing provisions are within the constitutional prohibition of *ex post facto* laws; a defendant may not be sentenced to a term of imprisonment exceeding the maximum provided for at the time of his crime. *Cooper v. State*, 432 P.2d 951, 4 CLB 74.

**§54.64. Entrapment — in general**

**Court of Appeals, 6th Cir.** Where defendant, charged with a sale of narcotics, claims entrapment, testimony, over defense counsel's objection, that defendant had been arrested on a narcotics charge eight years before (and the case had been dismissed) was reversible error. *United States v. White*, 390 F.2d 405, 4 CLB 113.

**Court of Appeals, 9th Cir.** That government agents and informers befriend the defendant does not amount to entrapment as a matter of law, especially where trial court finds that defendant is "predispos[ed] to commit" a crime. *U.S. v. Quevedo*, 399 F.2d 307, 4 CLB 593.

**New Mexico** The defense of entrapment is not available to the defendant when he initiates the unlawful act. *State v. Romero*, 445 P.2d 587, 4 CLB 596.

**§54.69. Immunity from prosecution**

**New York** If the "prospective defendant" or "target" of a grand jury investigation is called to testify before that grand jury, he is automatically shielded from prosecution for any substantive crime connected with his testimony *without having*

*to claim his privilege.* (*People v. Steuding*, 7 N.Y.2d 214); but he is not licensed to lie under oath, and he may be prosecuted for perjury if his testimony before the grand jury is found to be wilfully false. *People v. Tomasello*, 21 N.Y.2d 143, 4 CLB 64.

**New York** A public officer who testifies before a grand jury after signing a waiver of immunity on pain of losing his job may not be prosecuted for any substantive crime arising from his testimony, since such a waiver is void (*Garrity v. New Jersey*, 385 U.S. 493); but he, too, may be prosecuted for perjury if he tells wilfully lies to the grand jury. *People v. Goldman*, 21 N.Y.2d 152, 4 CLB 64.

**New York Appellate Division** A police officer who signed a waiver of immunity under compulsion of losing his job could still be indicted for perjury for wilfully testifying falsely before the grand jury even though the waiver was void. *People v. Straehle*, 294 N.Y.S.2d 42, 4 CLB 598.

**§54.70. Impossibility of performance**

**New Jersey** Conviction for conspiracy to commit abortion sustained despite fact that woman to be aborted was not pregnant. *State v. Moretti*, 244 A.2d 497, 4 CLB 534.

**§54.80. Insanity — Substantive tests**

**Court of Appeals, 9th Cir.** Defendant suffering from "pathological intoxication" (a latent mental condition caused by head injuries or brain damage which lowers tolerance level to alcohol resulting in accelerated intoxication and such possible drastic reactions upon consumption of a relatively small amount of alcohol as confusion, amnesia, loss of perception to reality, etc.) was not entitled to an acquittal on manslaughter charge stemming from fatal shooting of his wife after he had a few drinks and blacked out. Although expert medical witnesses were unanimous that defendant, at the time he shot his wife, did not know the nature and quality of his action and was in an uncontrollable state, he may not be excused from criminal responsibility where he only came

under disability when he voluntarily began to drink. *Kane v. United States*, 399 F.2d 130, 4 CLB 414.

**§54.82. — Procedures for asserting defense**

**Texas** Defendant was properly permitted to withdraw his insanity plea and plead guilty without further hearing after a jury empaneled to determine his sanity could not agree on a verdict. *Ex parte Adams*, 430 S.W.2d 194, 4 CLB 531.

**§54.85. — Right to separate (bifurcated) trial on issue of insanity**

**Court of Appeals, District of Columbia** Motion for bifurcated trial on issues of sanity and guilt is directed to broad discretion of trial judge and denial thereof, where motion was based on condition of separate juries deciding each issue, was not abuse of discretion in the facts of this case. *Parman v. U.S.*, 399 F.2d 559, 4 CLB 593.

**§54.90. Insanity — Burden of proof**

**Colorado** A statute requiring a defendant who pleads not guilty by reason of insanity to prove his insanity by a preponderance of the evidence violates the due process clause of the Constitution of the State of Colorado, but not that of the Fourteenth Amendment to the United States Constitution. *People ex rel. Juhan v. District Court*, 439 P.2d 741, 4 CLB 313.

**§55.05. — Expert testimony**

**Court of Appeals, 2nd Cir.** A psychiatrist appointed to examine a defendant in connection with his competence to stand trial pursuant to 18 U.S.C. 4244, may not testify with regard to the defendant's sanity at the time of a crime, where that information comes from his discussions with the defendant relative to his appointment, first because the statute forbids it ("No statement made by the accused in the course of any examination into his . . . mental competency provided by this section . . . shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding . . .) and sec-

ondly, because it is fundamentally unfair to tell a defendant he is being examined for one purpose, gain his cooperation, and then examine him for another purpose. *United States v. Driscoll*, 399 F.2d 135, 4 CLB 529.

**Maryland** Trier of fact was justified in accepting testimony of lone prosecution expert that defendant was sane, and rejecting opinion of his insanity given by two defense experts. *Rozzell v. State*, 245 A.2d 917, 4 CLB 599.

**§55.60. Lack of jurisdiction and improper venue**

**Court of Appeals, 2nd Cir.** Federal district court has jurisdiction to indict and convict a foreign citizen of the crime of knowingly making a false statement under oath in a visa application to an American consular official in a foreign country, in violation of 18 U.S.C. 1546, *United States v. Pizzarusso*, 388 F.2d 8, 4 CLB 40.

**Court of Appeals, 10th Cir.** Defendant's possession, in Oklahoma, of fruits of Kansas bank robbery does not, by itself, establish proper venue in Kansas federal district court for prosecution for receiving the fruits. *Jenkins v. United States*, 392 F.2d 303, 4 CLB 180.

**Kansas** The defendant has the burden of proving that the State offered and the federal government accepted exclusive jurisdiction over crimes committed on property located within the state; Appellate court will not go outside record on appeal to decide this question. *Kansas City v. Garner*, 430 S.W.2d 630, 4 CLB 476.

**Pennsylvania** Pennsylvania Penal Code provision, making it a misdemeanor to commit fornication and providing for a fine and expenses to pay for birth and maintenance of the bastard child, does not authorize the court to try an indictment charging fornication and bastardy where the child has been born outside Pennsylvania to a nonresident prosecutrix. *Commonwealth v. Shook*, 236 A.2d 559, 4 CLB 134.

**§55.70. Res judicata**

**Michigan** Dismissal of a charge for lack of probable cause after a preliminary examination was not a bar, on res judicata grounds, to a subsequent arrest, examination, and trial for the same offense. *People v. Robinson*, 160 N.W.2d 744, 4 CLB 482.

**Oklahoma** When during the course of a trial for murder, the defendant is offered and accepts a guilty plea to the lesser charge of manslaughter, the State is estopped from trying the defendant on the original murder charge when the manslaughter plea is thereafter set aside on the ground that it was not freely and voluntarily entered. Having elected to allow the defendant to plead to the lesser charge and having moved the court to reduce the charges so that the defendant could enter the plea, the state is estopped from reinstituting the initial murder charge. *Ward v. State*, 444 P.2d 255, 4 CLB 474.

**§55.80. Self-defense — in general**

**Michigan** The duty to retreat before using deadly force in self-defense does not apply to a wife who defends herself with a butcher knife when attacked with a loaded firearm by her husband in their mutual home. *People v. McGrandy*, 156 N.W.2d 48, 4 CLB 196.

**§56.20. Statute of limitations**

**United States Supreme Court** Six-year statute of limitations in tax evasion prosecutions commences to run not from date return was due but from date return was actually filed. *United States v. Habig*, 390 U.S. 222, 4 CLB 106.

**§56.35. Unconstitutionality of statute or ordinance — Equal protection**

**Minnesota** An ordinance providing criminal penalties for the failure of nonresident peddlers to obtain a license and post a bond is unconstitutional as an arbitrary discrimination (as against resident peddlers) and an undue burden on interstate commerce. *State v. Schmidt*, 159 N.W.2d 113, 4 CLB 375.

**§56.38. Unconstitutionality of statute or ordinance — Improper exercise of police power**

**Court of Appeals, 1st Cir.** In the interests of promoting interstate commerce of legal drugs and prohibiting interstate commerce of illegal drugs, Congress, under the Commerce Clause, may restrict all sales of drugs even though an individual sale may be purely intrastate and have no effect on interstate commerce.

Congress can properly delegate to the Secretary of Health, Education, and Welfare the responsibility of designating certain drugs which are to be prohibited as "depressants or stimulants." *White v. United States*, 395 F.2d 5, 4 CLB 242.

**Michigan** A statute requiring motorcyclists to wear crash helmets, on pain of criminal sanctions, is unconstitutional because it bears no relationship to the public health, safety, and welfare. *American Motorcycle Assn. v. Davids*, 158 N.W.2d 72, 4 CLB 324.

**§56.40. Unconstitutionality of statute or ordinance — Violation of First Amendment**

**Alabama** Birmingham "parade-permit" statute is not void on its face as a vehicle to permit city officials to act as censors, but rather serves a legitimate public interest in promoting safety, comfort and convenience for those using the public streets. *Shuttlesworth v. City of Birmingham*, 206 So.2d 348, 4 CLB 189.

**California** An ordinance punishing presence in a common carrier terminal for any period "longer than reasonably necessary" to transact business with a carrier using the terminal is an unconstitutional restraint upon free speech. *In re Hoffman*, 434 P.2d 353, 4 CLB 133.

**New Mexico** Fact that defendant allowed body of deceased to remain on his property for thirty days without embalming or burial only because he believed God did not want the body buried was no defense to common law prosecution for indecent handling of a dead body. *State v. Hartzler*, 433 P.2d 231, 4 CLB 57.

**§56.42. Unconstitutionality of statute or ordinance — Obscenity**

**California** An ordinance imposing criminal sanctions for operating a movie theatre without first obtaining a city license (which could be withheld for "bad moral character" or "bad reputation") is void for undue administrative discretion and as a prior restraint upon the exercise of First Amendment rights. Prohibition lies to enjoin a prosecution thereunder even though the party aggrieved has made no attempt to obtain a license. *Burton v. Municipal Court of Los Angeles Judicial District*, 441 P.2d 281, 4 CLB 431.

**§56.45. Unconstitutionality of statute or ordinance — Void for vagueness**

**Hawaii** An ordinance proscribing presence at a cockfight is void for vagueness. A prospective defendant cannot tell where he must stop in order not to be "present." The legislature did not specify exactly what it meant. *State v. Abellano*, 441 P.2d 333, 4 CLB 499.

**Iowa** A statute prohibiting the transfer of certain drugs but exempting any act of a pharmacist, doctor, etc., which is "necessary in the ethical and legal performance of his profession," is unconstitutionally vague as applied to a pharmacist selling a drug without a prescription. *State v. Webb*, 156 N.W.2d 299, 4 CLB 196.

**§56.50. Violation of Fourth Amendment**

**Court of Appeals, 3rd Cir.** Fourth Amendment bars prosecution of company officers for their refusal to allow Food and Drug inspector to examine company records where no formal subpoena designating the specific records in question was ever served upon them. *United States v. Stannack Sales Co.*, 387 F.2d 849, 4 CLB 43.

**§57.00. "Allen" dynamite charge**

**Alaska** When the jury is split eleven to one in favor of a guilty verdict, and the sole dissenting juror is identified in open court, it is nevertheless proper for the judge to administer an "Allen charge" (*Allen v. United States*, 164 U.S. 492) in hopes of getting a verdict. *Gafford v. State*, 440 P.2d 405, 4 CLB 375.

**Illinois** Where close factual question of accused's guilt or innocence is presented, delivery of "dynamite" charge to deadlocked jury, followed by markedly brief deliberation producing unanimity for conviction, is tantamount to coerced verdict. *People v. Richards*, 237 N.E. 848, 4 CLB 429.

**§57.05. Accomplice testimony**

**Court of Appeals, 2nd Cir.** Trial judge's charge that accomplice testimony should be "received with caution and weighed with care" was sufficient. Trial judge was not required, in addition, to tell jury that accomplice testimony was to be given "greater scrutiny." *United States v. Mattio*, 388 F.2d 368, 4 CLB 40.

**Court of Appeals, 3rd Cir.** Instruction to a jury that "ordinarily, it is assumed that a witness will speak the truth . . ." is not by itself reversible error where defendant testified in his own behalf and called other witnesses to support his defense. However, conviction is reversed where, in addition, trial court failed to give accomplice charge with regard to testimony of principal government witness, and erroneously allowed an alibi witness for defendant to be impeached by a misdemeanor conviction for a crime not involving moral turpitude. *United States v. Evans*, 398 F.2d 159, 4 CLB 359.

**§57.10. Burden of proof**

**Court of Appeals, 2nd Cir.** Prosecutor's statement in summation that defendant was "doubly vicious because he demanded his full constitutional rights here knowing full well he was guilty" combined with trial judge's charge that jury should acquit defendant if "it is more likely that he is innocent than guilty" required a new trial. *United States v. Hughes*, 389 F.2d 535, 4 CLB 116.

**§57.43. — Defendant's credibility in particular**

**Iowa** Having given a general instruction explaining the jury's duty to weigh the credibility of all witnesses in light of various common variables, a trial judge should not instruct the jury specially with regard

to its duty to determine the defendant's credibility as a witness. Such an instruction singles out the defendant's testimony unfairly for particular scrutiny, but the erroneous instruction is not by itself ground for reversal. *State v. Allnut*, 156 N.W.2d 266, 4 CLB 190.

**§57.50. Duty to charge on defendant's theory of defense**

**Court of Appeals, 7th Cir.** It was not error for trial court to refuse to give insanity charge in tax evasion prosecution where evidence tended to establish lack of willfulness due to psychological disturbance rather than insanity. *United States v. Gorman*, 393 F.2d 209, 4 CLB 177.

**Florida** Trial court's failure to charge the jury on the defense of coercion constitutes reversible error. *Koontz v. State*, 204 So.2d 224, 4 CLB 65.

**§57.60. Duty to charge on essential elements of crime**

**California** Although an indictment charges that the offense occurred "during the month of June, 1965," and the defense is alibi, it is not error for the trial court to charge that the defendant may be found guilty if the jury concludes that he committed the offense at any time within the time covered by the evidence. *People v. Wrigley*, 443 P.2d 580, 4 CLB 426.

**§57.69. Intent and willfulness**

**Court of Appeals, 3rd Cir.** Where indictment charges the defendant with "willfully" failing to report for induction into the Army in violation of 50 U.S.C. App. 462(a), trial judge's charge that "the word (wilful) is also employed to characterize the thing done without ground for believing it is lawful or conduct marked by reckless disregard, whether or not one has the right so to act" was reversible error. In such a case, the government must establish knowledge of the legal obligation and voluntary action or omission with the purpose of failing to perform such obligation. *United States v. Rabb*, 394 F.2d 230, 4 CLB 247.

**Maryland** Trial court's failure to clearly instruct on defendant's intoxication as bearing on his capacity to form specific intent is reversible error. *Avey v. State*, 240 A.2d 107, 4 CLB 317.

**§57.70. Lesser included offenses**

**Iowa** A defendant on trial for forcible rape is entitled to have submitted to the jury the lesser included crimes of assault with intent to commit rape, assault and battery, and simple assault, regardless of the probability that he is either guilty of the greatest crime or altogether innocent. *State v. Pilcher*, 158 N.W.2d 631, 4 CLB 375.

**Iowa** Unauthorized operation of a motor vehicle is not a lesser included offense within the crime of larceny of a motor vehicle; the latter crime can be committed without driving the car (e.g., by towing it), but the former requires that it be driven. *State v. Everett*, 157 N.W.2d 144, 4 CLB 319.

**Minnesota** At a murder trial, the judge is justified in refusing to instruct the jury as to the lesser included crime of manslaughter (homicide without a design to effect death) if the proof is that a brutal and sustained attack was the cause of death and if the defendant has made an admission indicative of deliberation. *State v. Steeves*, 157 N.W.2d 67, 4 CLB 318.

**Wisconsin** Failure to give jury instructions regarding lesser degrees of the crime charged is not plain error, though such instructions would have been proper on the evidence. *Green v. State*, 156 N.W.2d 477, 4 CLB 318.

**Missouri** Police officer's answer, in response to prosecutor's question as to why he arrested the defendant, that the defendant fit the description of the robber "and he is a known holdup subject" does not require a reversal where trial judge promptly instructed jury to disregard that answer. *State v. Mallory*, 423 S.W.2d 721, 4 CLB 256.

**§57.77. Motive**

**New Jersey** Trial court's inaccurate state-

ment to jury, that accomplice, by testifying for State, could not gain reduction in sentence, required new trial. *State v. Dent*, 241 A.2d 833, 4 CLB 428.

**§57.92. Presumptions and inferences —  
Presumption that witness speaks  
the truth**

**Court of Appeals, 3rd Cir.** Instruction to a jury that "ordinarily, it is assumed that a witness will speak the truth . . ." is not by itself reversible error where defendant testified in his own behalf and called other witnesses to support his defense. However, conviction is reversed where, in addition, trial court failed to give accomplice charge with regard to testimony of principal government witness, and erroneously allowed an alibi witness for defendant to be impeached by a misdemeanor conviction for a crime not involving moral turpitude. *United States v. Evans*, 398 F.2d 159, 4 CLB 359.

**§58.00. — Recent and exclusive  
possession (See also §23.00)**

**North Carolina** In charging a jury that a defendant's guilt of larceny may be presumed from his possession of recently stolen goods, a judge must not give the jury the impression that there is any burden upon the defendant to come forward with any evidence to rebut the conclusion of his guilt. *State v. Hayes*, 161 S.E.2d 185, 4 CLB 378.

**§58.05. Punishment (or disposition  
following insanity acquittal) of  
no concern to jury**

**Michigan** At a murder trial where the main defense is insanity, it is proper to refuse defendant's request to inform the jury what the disposition of the defendant will be if he is acquitted by reason of insanity. Although a statute requires his mandatory incarceration for life in a hospital for the criminally insane in such an event, this fact is no more the jury's concern than the punishment of a convicted person. *People v. Cole*, 154 N.W.2d 579, 4 CLB 134.

**§60.00. Requirement of an impartial jury  
— in general**

**United States Supreme Court** Where jurors who expressed objections against imposition of death penalty were dismissed for cause without further inquiry into whether they could set aside their objections in a given case, the imposition of the death penalty by the jury finally selected violated due process. *Witherspoon v. Illinois*, 391 U.S. 510, 4 CLB 297.

**§60.08. Requirement of an impartial jury  
— Systematic exclusion of  
Negroes etc.**

**Illinois** Absence of Negroes from jury panel in county where ten per cent of population is Negro is, without more, insufficient to make out prima facie case of deliberate exclusion; evidence properly admissible despite lack of direct proof connecting it to defendant. *People v. Cross*, 237 N.E.2d 437, 4 CLB 475.

**§60.10. Conduct of voir dire  
— in general**

**Oregon** Defense counsel, in a prosecution for abortion, was entitled to ask prospective jurors their religious faith. He was not precluded by the fact that the jurors had already stated that they did not have any religious beliefs that would prevent them from being impartial jurors and from giving defendant a fair trial. *State v. Barnett*, 445 P.2d 124, 4 CLB 539.

**Texas** Failure to challenge prospective juror for cause because he is the son of a county attorney participating in the prosecution is a waiver of the objection to his qualifications where (1) defense counsel after being informed of the father-son relationship and after being extended another peremptory challenge by the trial court, failed to use the challenge to strike the son, and (2) where the county attorney withdrew from the case after the jury had been sworn. *Allen v. State*, 419 S.W.2d 852, 4 CLB 65.

**§60.60. Conduct of voir dire  
— Prejudice on part of  
individual jurors**

**Oklahoma** Failure of juror to reveal

knowledge of and prejudice toward defendant necessitates new trial. Fixing of sentence by simply averaging out each juror's view was improper. *West v. State*, 443 P.2d 131, 4 CLB 431.

**Tennessee** Where member of jury which found appellant guilty of transporting intoxicating liquors had, five years earlier, procured a search warrant to search appellant's home for intoxicating liquors he thought she was selling his son-in-law, there was reason to believe he was "at least hostile" to appellant; and she was deprived of a fair trial and her conviction was reversed. *State v. Hyatt*, 430 S.W.2d 129, 4 CLB 538.

**§60.75. Experience in other criminal cases as affecting jurors' impartiality**

**Court of Appeals, 2nd Cir.** Second Circuit declines to find prejudice as a matter of law where seven jurors in appellant's trial had, just prior to that trial, also sat in two other narcotic trials stemming from the same investigation in which the same government agents (who were to testify in appellant's case) testified and in which there had been two convictions. *United States v. Haynes*, 398 F.2d 980, 4 CLB 529.

**Maryland** Defendant is not deprived of a fair trial by an impartial jury merely because four jurors had sat on another jury which had convicted the defendant of another crime in the past; defendant must show some actual prejudice to entitle him to relief. *Jones v. State*, 234 A.2d 900, 4 CLB 65.

**§61.20. Deliberation — Extra-judicial communications**

**New Mexico** During a recess after both sides had rested, someone brushed against a juror and said, "Make a wise decision." The juror reported this in open court and said that it would not influence her verdict. The offender was arrested in the courtroom. It was no error to deny a mistrial based on the foregoing, as the comment to the juror was not probably or in-

herently prejudicial. *State v. Gutierrez*, 433 P.2d 508, 4 CLB 65.

**§61.25. — Inquiries from jury and supplemental instructions**

**California** When a jury requests the reading of the testimony of certain witnesses, it is not coercive for the court to inform them that the transcripts will not be available for reading until the following day and that the jury will be sequestered and not released until they arrive at a verdict. *People v. Gonzalez*, 439 P.2d 655, 4 CLB 314.

**Illinois** Trial court's interruption of jury's deliberation did not prejudice defendant. *People v. Gardner*, 240 N.E.2d 359, 4 CLB 538.

**§62.04. Verdict — Inconsistent verdicts**

**Maryland** Conviction of assault with intent to rape not inconsistent with acquittal on rape count. *Stewart v. Maryland*, 244 A.2d 452, 4 CLB 548.

**N.Y. App. Div.** Since charges of first degree sodomy and sexual misconduct include identical elements, the acquittal of the sodomy charge and conviction of the sexual misconduct charge are not only inconsistent but repugnant. *People v. Bullis*, 294 N.Y.S.2d 31, 4 CLB 598.

**§63.10. Procedure where misconduct is brought to light — Duty of trial judge to poll jury or conduct inquiry**

**Iowa** Affidavit of jury foreman to the effect that none of the jurors could recall the necessary elements of self-defense in reaching guilty verdict was insufficient to overturn conviction. Jurors may not impeach their own verdicts in this manner. *State v. Washington*, 160 N.W.2d 337, 4 CLB 431.

**§65.25. Pre-sentence report — contents**

**Court of Appeals, 9th Cir.** Where pre-sentence report contained damaging references based upon illegally seized evidence, appellant was entitled to be re-

sentenced. *Verdugo v. United States*, 402 F.2d 599, 4 CLB 497.

**§65.30. Pre-sentence report — right to examine pre-sentence report**

**Idaho** Where a pre-sentence report is used by the trial judge as a basis for determining the sentence to be imposed, full disclosure of the contents of the report must be made to the defendant in order to afford him a full opportunity to present evidence in mitigation of punishment. *State v. Rolfe*, 444 P.2d 428, 4 CLB 478.

**§65.65. Standards for imposing sentence**

**New York** The one day to life New York sex offender sentence "is limited to those cases in which the record indicates some basis for a finding that the defendant is a danger to society and/or is capable of being benefited by the confinement envisaged under the statutory scheme. Absent such a basis the sentence cannot stand." Psychiatric report must analyze defendant's sexual problem and whether it is likely to yield to treatment. It must also state the risk involved in immediate release with or without treatment. Defendants sentenced under the statute are entitled to a hearing. *People v. Bailey*, 21 N.Y.2d 588, 4 CLB 192.

**§65.68. Invalid conditions**

**Court of Appeals, 9th Cir.** "At least where an admission of guilt cannot jeopardize a prospective appeal, and having in view the purpose of probation referred to above, it is not an abuse of discretion for a district judge to deny probation to a person who, after conviction, will not admit wrongdoing." *Whitfield v. United States*, 401 F.2d 480, 4 CLB 497.

**Illinois** Denial of probation because defendant was a "hippie" reversed as abuse of discretion. *People v. McAndrew*, 239 N.E.2d 314, 4 CLB 479.

**§66.10. Cruel and unusual punishment**

**Kentucky** Life sentence without parole of juvenile convicted of rape held to

constitute cruel and unusual punishment. *Workman v. Commonwealth*, 429 S.W.2d 374, 4 CLB 423.

**Washington** To punish a chronic addictive alcoholic for public drunkenness is neither cruel and unusual punishment nor an unreasonable exercise of the state's police power. *City of Seattle v. Hill*, 435 P.2d 692, 4 CLB 188.

**§66.15. Cruel and unusual punishment — Particular penalties as constituting cruel and unusual punishment**

**Court of Appeals, 7th Cir.** Federal sentencing scheme under which marijuana and opium offenses carry the same penalties does not constitute an unreasonable classification. Nor do the applicable sentences for federal marijuana offenses constitute cruel and inhuman punishment. *United States v. Ward*, 387 F.2d 843, 4 CLB 47.

**Alaska** A sentence of five years on each of seven counts of drawing checks with insufficient funds with intent to defraud and sentence of one year on one count of issuing a check without funds with all sentences to run consecutively was ordered vacated because one judge was of the opinion that such a sentence constituted cruel and unusual punishment and another judge was of the opinion that the sentence was excessive. *Faulkner v. State*, 445 P.2d 815, 4 CLB 608.

**Arizona** It is not cruel and unusual punishment to impose criminal sanctions upon a narcotics addict for "being under the influence of narcotics." *State v. Brown*, 440 P.2d 909, 4 CLB 375.

**§66.30. Excessive sentences**

**Nebraska** Under an appellate court's statutory power to reduce sentences deemed by it to be excessive, a death sentence for the crime of murder entered on a plea of guilty is not excessive solely because the defendant was given no consideration for his plea. *State v. Alvarez*, 154 N.W.2d 746, 4 CLB 137.

**§66.35. Imposition of fines upon indigent defendants**

**Oklahoma** A statute providing for (1) the assessment of court costs against a convicted defendant; (2) the exaction of one day's imprisonment per unpaid dollar of such costs, and (3) the fixing of a ceiling of six months of such imprisonment for indigent defendants, in addition to the sentence imposed, is unobjectionable. *McFadden v. State*, 437 P.2d 284, 4 CLB 192.

**§66.50. Increasing sentence upon retrial**  
**Court of Appeals, 5th Cir.** Where original consecutive sentences were reversed by Supreme Court because, in its view, only one crime had been committed, trial court had discretion to impose completely new sentence and was not limited by terms and scope of original sentence. *Castle v. U.S.*, 399 F.2d 642, 4 CLB 594.

**Kansas** After appellate reversal of a conviction, followed by a new trial and a new conviction, it is proper to invoke multiple-offender statutes in order to augment the punishment imposed even though these provisions were not used in the sentence imposed upon the conviction which was reversed. The defendant is deemed to have consented to the absolute eradication of the invalidated proceedings by seeking their reversal. *State v. Young*, 434 P.2d 820, 4 CLB 127.

**New Jersey** The imposition of a more severe sentence following a retrial after a successful appeal is justified and suffers no constitutional impediment where the defendant has been convicted of other crimes between the first and second trial, since the second sentencing court acted on new information concerning the defendant's background. *State v. Jacques*, 239 A.2d 252, 4 CLB 259.

**§66.60. Multiple punishment — in general**

**Kansas** Due process and equal protection are not lacking in a statutory scheme which results in a greater mandatory minimum sentence for a second offender than that provided for a third offender

convicted of the same crime. *State v. Shaw*, 440 P.2d 570, 4 CLB 381.

**§66.90. Multiple punishment — Merger doctrine**

**District of Columbia** Imposition of consecutive 120 day sentences for (1) keeping whiskey for sale and (2) selling it without a license constituted double punishment where each count involved the same single bottle of whiskey. *Hicks v. District of Columbia*, 234 A.2d 801, 4 CLB 69.

**§80.25. Dangerous and deadly weapons**  
**Utah** One who possesses an unloaded but workable firearm, together with ammunition which may readily be inserted into the gun and as readily removed from it, possesses the equivalent of a loaded firearm for purposes of prosecution for assault with a deadly weapon. *State v. Hansen*, 436 P.2d 4 CLB 196.

**§80.26. Disorderly conduct**

**North Dakota** Statutory disorderly conduct may be committed by conduct which is offensive to or which annoys only one person. *City of Bismarck v. Travis*, 154 N.W.2d 918, 4 CLB 131.

**§80.40. Forgery**

**Court of Appeals, 4th Cir.** Defendant who, with intent to defraud, opens a bank account in a fictitious name, signs the fictitious name to a check and represents himself to the payee as the fictitious person has committed forgery. *United States v. Metcalf*, 388 F.2d 440, 4 CLB 115.

**Colorado** A check dated one year in futuro is an instrument which may be the subject of the crime of forgery. *Gentry v. People*, 441 P.2d 675, 4 CLB 425.

**Washington** It is forgery to sign another's name to a bar or restaurant customer's check for drinks or meals. Such checks are a "writing or instrument by which any claim . . . (or) obligation . . . is . . . evidenced," which can be made the basis of a forgery charge. *State v. Vangen*, 433 P.2d 691, 4 CLB 59.

**Wisconsin** In the prosecution of a wife for forging the name of her estranged husband on checks, it is immaterial that the defendant's husband may have been indebted to her for alimony past due. The requisite intent to defraud is present if the defendant sought only to obtain a temporary advantage by proscribed means; and evidence of debt is properly excluded. *State v. Christopherson*, 153 N.W.2d 631, 4 CLB 59.

**§80.62. Intoxicated driving**

**Texas** Failure to take appellant before Magistrate until twelve hours after his arrest, where record neither shows that he requested permission to call a physician while in jail nor that he was indigent, does not constitute a denial of equal protection, i.e., the right to a sobriety test at own expense. *State v. Harlan*, 430 S.W.2d 213, 4 CLB 536.

**§80.65. Kidnapping**

**Minnesota** Removal of complainant a distance of only 100 or 150 feet and detaining her for five minutes for the sole purpose of committing an indecent assault was sufficient evidence to sustain a conviction for kidnapping. *People v. Morris*, 160 N.W.2d 715, 4 CLB 476.

**§81.10. Obscenity**

**United States Supreme Court** Local ordinance requiring special license for films "not suitable for young persons" by reason of censorship Board's determination that they are "likely to incite or encourage crime and delinquency or sexual promiscuity" held unconstitutionally vague. *Interstate Circuit Inc. v. Dallas*, 390 U.S. 676, 4 CLB 238.

**United States Supreme Court** Statute which prohibited sale of nonobscene literature "harmful to minors" to persons under the age of 17 held constitutional. *Ginsberg v. New York*, 390 U.S. 629, 4 CLB 237.

**Court of Appeals, 7th Cir.** Police officers' seizure of film, "I, A Woman" after they had viewed it in its entirety at a public theatre held to be unreasonable. Al-

legedly obscene publications and movies may not be treated as narcotics, gambling paraphernalia, and other contraband, and before a movie can constitutionally be seized, there must be an adversary proceeding on the issue of obscenity. *Metzger v. Percy*, 393 F.2d 202, 4 CLB 307.

**Court of Appeals, 8th Cir.** Absent a showing of a prurient appeal, commercial exploitation of nudist magazines (which are as a class not obscene *per se*) does not satisfy the pandering test of *Ginzburg v. United States*, 383 U.S. 463.

Nor does an implied direction from publisher to editor to push books dealing with lesbianism by itself, satisfy pandering test. *Luros v. United States*, 389 F.2d 200, 4 CLB 175.

**Dist. of Columbia** Prosecution's failure to prove community standards entitles defendant to judgment of acquittal. *Hudson v. United States*, 234 A.2d 903, 4 CLB 66.

**Minnesota** A statute prohibiting the use of the mails to convey an obscene "writing" does not cover the transmission of an obscene private letter between consenting adults. *State v. Haas*, 159 N.W.2d 118, 4 CLB 376.

**New Jersey** In view of the finding that defendant had "just cause" to exhibit and explain the use of contraceptive devices, Supreme Court of New Jersey reverses conviction for violation of statute prohibiting display or exposure of such material, and refuses to pass on its constitutionality. *State v. Baird*, 235 A.2d 673, 4 CLB 136.

**§81.20. Perjury**

**Illinois** Absence of proof of fundamental element of perjury — intention to falsify — requires reversal of defendant's conviction. *People v. Pearson*, 240 N.E.2d 337, 4 CLB 540.

**Minnesota** The fact that a public employee's First Amendment liberties are violated in proceedings to dismiss him because of alleged membership in the Communist Party does not immunize him from prosecution for perjury if, in such proceed-

ings, he falsely testifies that he is not a member of the Communist Party. *State v. Forichette*, 156 N.W.2d 93, 4 CLB 191.

#### §81.35. Robbery

**Michigan** In a prosecution for robbery, it is no defense that the person from whom the property was taken was not its owner. The court will not even concern itself with questions of agency and subagency in the custodianship of the property. *People v. Needham*, 155 N.W.2d 267, 4 CLB 193.

**Texas** Victim's testimony that defendant had picked up her purse from seat of car where she had placed it after hearing shot, rushing out of store, seeing her wounded husband lying in the front seat of the car, and rushing to his assistance is sufficient to establish a robbery; dissent contends that the conviction should have been reversed since, in the absence of proof that there was any actual or threatened violence against her, the evidence, at best, established nothing more than a simple theft. *Ford v. State*, 423 S.W.2d 300, 4 CLB 257.

#### §81.70. Vagrancy

**Massachusetts** Supreme Judicial Court of Massachusetts overturns state vagrancy statutes. *Alegata v. Commonwealth*, 231 N.S.2d 201, 4 CLB 75.

#### §82.60. Assault on federal officer

**Court of Appeals, 5th Cir.** Fifth Circuit, with one judge dissenting, notes contradictory lines of cases within the Circuit and then holds "that scienter is not required either in the indictment or in the proof to sustain a conviction under 18 U.S.C. 111 for assaulting a federal employee. *Pipes v. U.S.*, 399 F.2d 471, 4 CLB 592.

#### §82.70. Drug violations

**Court of Appeals, 9th Cir.** Ninth Circuit upholds constitutionality of 1965 Amendments to the Federal Food, Drug and Cosmetic Act making the non-prescription sale or possession (for other than one's personal use) of stimulant or depressant

drugs a federal crime even though drugs are concededly local in origin and identifiable as such. *Deyo v. United States*, 396 F.2d 595, 4 CLB 361.

#### §82.80. Dyer Act (Interstate transportation of stolen motor vehicle)

**Court of Appeals, 8th Cir.** Where the evidence established only that appellant knowingly became a passenger in a stolen car, but neither drove it nor paid expenses, his conviction for violation of the Dyer Act (Interstate transportation of stolen vehicle) was reversed. *Baker v. United States*, 395 F.2d 368, 4 CLB 307.

#### §83.25. Interstate transportation of forged securities

**Court of Appeals, 2nd Cir.** Defendant "willfully causes" the interstate transportation of counterfeit securities in violation of 18 U.S.C. 2314 and 2, where he gives the securities to an innocent third party, and it is reasonably foreseeable that the securities will subsequently be taken across state lines. *United States v. Scandifia*, 390 F.2d 244, 4 CLB 108.

#### §83.60. Prosecutions under Federal Civil Rights Act

**United States Supreme Court** Conspiracies by "outside hoodlums" (as distinguished from proprietors) to assault Negroes for exercising their rights to equal public accommodations are subject to criminal prosecution under 18 U.S.C. 241. *United States v. Johnson*, 390 U.S. 563, 4 CLB 172.

#### §83.80. Selective service violations

**Court of Appeals, 3rd Cir.** Where 4 members of the local draft board comprised a quorum, a 1-A classification entered by a 3-0 vote of the board after one of the members disqualified himself because of a business affiliation with the registrant's family was invalid. In re *Shapiro*, 392 F.2d 397, 4 CLB 247.

**Court of Appeals, 5th Cir.** Selective service registrant has no right to keep alive pending criminal charges (which make

him ineligible for draft). Fact that dismissal of pending criminal charges was obtained by city attorney who was also an appeal agent for the local board was no defense to registrant's refusal to submit to induction. *Sumrall v. United States*, 397 F.2d 924, 4 CLB 362.

**Court of Appeals, 6th Cir.** It is no defense to a prosecution for failing to report for induction into the armed forces that the Congressional purpose to provide for the common defense *could have been* accomplished by less drastic means than conscription if incentives for voluntary enlistment had been improved, chiefly by increased pay and opportunities for training. *United States v. Butler*, 389 F.2d 172, 4 CLB 121.

**Court of Appeals, 6th Cir.** Sixth Circuit refuses to decide whether a registrant whose father was killed in action in World War II was entitled to retain IV-A deferment as "sole surviving son" following the death of his mother where registrant failed to appeal draft board's reclassification. *United States v. McKart*, 395 F.2d 906, 4 CLB 308.

**Court of Appeals, 6th Cir.** "In cases where the claimed classification depends on objective facts, mere disbelief by the selective service authorities will not provide a basis in fact for granting a different classification. Where, however, the veracity of the registrant is the principal issue, disbelief will suffice. But even in the latter situation, the record must contain some statement of this disbelief if the classification is to be upheld upon judicial review. . . . In any event, we do not accept the view that the absence of specific doctrinal support for exemption from noncombatant service provides a basis in fact for appellant's I-A-O [conscientiously opposed to combatant service but available for noncombatant service] classification. . . ." *United States v. Washington*, 392 F.2d 37, 4 CLB 179.

**Court of Appeals, 9th Cir.** Failure to furnish registrant with Armed Forces Security Questionnaire at pre-induction examination in violation of AR 601-270 voids

his subsequent conviction for refusing to submit to induction. *Oshatz v. United States*, 404 F.2d 9, 4 CLB 496.

**Court of Appeals, 9th Cir.** Membership in Jehovah's Witnesses does not automatically entitle registrant to I-O conscientious objector classification. Question is rather whether registrant has a sincere conscientious objection, by reason of religious training and belief, to participation in both combatant and noncombatant training and service in the Armed Forces. *Hunter v. United States*, 393 F.2d 548, 4 CLB 180.

**§85.30. Contempt — Right to jury trial**  
**United States Supreme Court** Criminal contempt punished by 2 years imprisonment must be tried by jury unless waived. *Bloom v. Illinois*, 391 U.S. 194, 4 CLB 234.

**United States Supreme Court** Prosecution for criminal contempt resulting in 10 days imprisonment and \$50.00 fine, the maximum punishment authorized by statute, held to be petty offense which does not require trial by jury. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 4 CLB 234.

**Minnesota** Trial by jury and prosecution by the State should be accorded in cases of criminal contempt as a matter of procedural fairness if not of constitutional right. *Peterson v. Peterson*, 153 N.W.2d 825, 4 CLB 56.

## DEPORTATION

**§85.60. Deportation — in general**  
**Court of Appeals, 2nd Cir.** Failure to give required statutory notice to Immigration and Naturalization Service in connection with sentencing court's recommendation that conviction not be used as basis for deportation of alien did not render recommendation nugatory. *Haller v. Esperdy*, 397 F.2d 211, 4 CLB 354.

**§86.30. Extradition proceedings — Scope of hearing**

**Vermont** Asylum state will not pass upon questions of alleged constitutional de-

privations occurring in demanding state. *Russell v. Smith*, 245 A.2d 563, 4 CLB 537.

### FORFEITURE PROCEEDINGS

#### §88.00. Forfeiture proceedings — in general

**Court of Appeals, 6th Cir.** Fact that federal wagering tax statutes violate the Fifth Amendment privilege against self-incrimination does not bar a civil forfeiture of property used in violation of those statutes. *United States v. One 1965 Buick*, 392 F.2d 672, 4 CLB 243.

**U.S. Dist. Ct. [N.Y.].** United States District Courts for the Southern and Northern Districts of New York, following a decision of the Seventh Circuit (*United States v. United States Coin and Currency, Angelini, Claimant*, 393 F.2d 499), holds that after *Marchetti* and *Grosso* (which established a Fifth Amendment defense to a prosecution for violating the Federal Gambling tax statutes), money used in violation of those statutes may no longer be forfeited by the government under 26 U.S.C. 7302. *United States v. \$3,296.00. in Currency*, 286 F.Supp. 543 (N.D.N.Y.), *United States v. \$125,882. in U.S. Currency*, 286 F.Supp. 643, 4 CLB 490.

#### §89.00. Right to be treated as juvenile

**Arizona** A minor defendant's right to be considered by the juvenile court for treatment as a juvenile rather than as an adult affects the criminal court's jurisdiction only of his person, and not of the subject-matter. Thus, the right is waived by his deliberate failure to assert his age in timely fashion; but he may have a hearing to determine whether his failure was intelligent and intentional. *State v. Superior Court of Pima County*, 436 P.2d 948, 4 CLB 190.

#### §89.12. — Burden of proof in juvenile proceeding

**Illinois** "It would not be consonant with due process or equal protection to grant allegedly delinquent juveniles the same procedural rights that protect adults

charged with crimes, while depriving these rights of their full efficacy by allowing a finding of delinquency upon a lesser standard of proof than that required to sustain a criminal conviction. Since the same or even greater curtailment of freedom may attach to a finding of delinquency than results from a criminal conviction, we cannot say that it is constitutionally permissible to deprive the minor of the benefit of the standard of proof distilled by centuries of experience as a safeguard for adults." *In re Urbasek*, 232 N.E.2d 716, 4 CLB 135.

**Texas** The Court of Civil Appeals of Texas, citing *In re Urbasek*, 38 Ill.2d 535, 232 N.E.2d 716, holds, "The underlying reasoning of *Gault* logically requires that a determination of delinquency is valid only when the facts of delinquency are proven beyond a reasonable doubt rather than by a preponderance of the evidence as now required by the present Texas decisions." *Santana v. State*, 431 S.W.2d 558, 4 CLB 540.

#### §89.15. — Right to counsel at waiver hearing

**California** *In re Gault*, 387 U.S. 1 (1967), does not confer a right to counsel at juvenile court proceedings to determine whether an accused should be tried as a juvenile or as an adult, but the right will be conferred prospectively in California to cases in which the judgment had not become final on the date of the *Gault* decision. *In re Harris*, 434 P.2d 615, 4 CLB 134.

**New Mexico** The right to counsel at a hearing to determine if juvenile should be transferred from juvenile court to district court can be waived if done knowingly and intelligently. *Neller v. State*, 445 P.2d 949, 4 CLB 602.

#### §89.20. — Retroactivity of right to counsel rulings

**Arizona** The holding of *In re Gault*, 387 U.S. 1 (1967), that criminal constitutional safeguards apply in proceedings to determine juvenile delinquency, is deemed to be retroactively available in Arizona.

Application of Billie, 436 P.2d 130, 4 CLB 190.

**Virginia** *Peyton v. French*, 207 Va. 73, 147 S.E.2d 739 (1966), in which the Supreme Court of Appeals of Virginia held that counsel must be provided to a defendant in juvenile court "waiver proceedings" to determine whether he should be tried as a juvenile delinquent or as a criminal, will be applied retroactively regardless of the defendant's present age. If he is too old for juvenile treatment but his case falls within *French*, he must be re-indicted and retried as an adult. *Gogley v. Peyton*, 160 S.E.2d 746, 4 CLB 318.

**§89.40. Juvenile proceedings — Standards for determining admissibility of confession or admission by juvenile**

**Court of Appeals, 5th Cir.** Fifth Circuit declines to "extend" *In re Gault*, 387 U.S. 1 (1967) to hold (1) that the pre-interrogation warnings required by *Miranda* apply to "pre-judicial stages" of federal juvenile delinquency proceedings or (2) that any prejudicial statement made by a 16-year-old juvenile outside the presence of his parents is automatically tainted even where the juvenile "waived" his *Miranda* rights. *West v. U.S.*, 399 F.2d 467, 4 CLB 596.

**Arizona** Incriminating statements made by a youthful defendant while under the jurisdiction of a juvenile court may not be used against him when it is later determined that he should be tried as an adult, unless prior to making the statement he and his parent or attorney are warned of the possibility of a criminal trial and of his right to silence. *State v. Maloney*, 433 P.2d 625, 4 CLB 54.

**COMMITMENT PROCEEDINGS**

**§89.70. Commitment proceedings — in general**

**Illinois** Respondent's constitutional rights were not violated when, in mental commitment proceedings, (a) he was called to the witness stand against his will, but was

not required to answer incriminating questions; and (b) a statute required that the jury include at least one physician. *People v. Keith*, 231 N.E.2d 387, 4 CLB 136.

**§89.75. — Narcotics addicts**

**New York** The New York Court of Appeals holds that a statute providing for the commitment and treatment of those persons found to be narcotics addicts is within the State's police powers notwithstanding the fact that these persons are not charged with criminal conduct. However, the procedures employed to commit such persons are constitutionally defective in that the statute fails to give the suspected narcotics addict adequate notice of the nature of the proceedings or the opportunity to contest the findings prior to the deprivation of his liberty. *Narcotics Addiction Control Commission v. James*, 22 N.Y.2d 545, 4 CLB 601.

**§90.00. Mandamus — in general**

**California** Mandamus will issue from California appellate court to compel a change in venue; *American Bar Association standards adopted*. *Maine v. Superior Court*, 438 P.2d 372, 4 CLB 325.

**§90.57. — Cruel and unusual treatment**

**Court of Appeals, 2nd Cir.** Federal district court must hear New York state prisoner's damage and injunction suit under the Federal Civil Rights Act based on a charge of cruel and unusual treatment during period of solitary confinement even though prisoner has made no attempt to obtain any relief in the state courts. *Wright v. McMann*, 387 F.2d 519, 4 CLB 40.

**§90.58. Grounds for suits by prisoners under Federal Civil Rights Act — Segregated prison facilities**

**United States Supreme Court** Supreme Court affirms ruling of three-judge District Court declaring unconstitutional Alabama statutes providing for racial segregation in prisons. *Lee v. Washington*, 390 U.S. 333, 4 CLB 102.

**§92.60. Use of informants**

Court of Appeals, 5th Cir. Fifth Circuit approves use of "contingent fee agreements" to obtain evidence from informants and distinguishes *Williamson v.*

*U.S.*, 311 F.2d 441 (5th Cir. 1962) where the informants were paid for information leading to the conviction of named persons as to crimes not yet committed. *Moore v. U.S.*, 399 F.2d 318, 4 CLB 593.

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